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BRB Nos.: 99-0852; 00-0500; 00-1092

Case No.: 1995-LHC-1175

OWCP No.: 6-159199

In the Matter of:

RICHARD MCBRIDE
Claimant

v.

HALTER MARINE, INC.
Employer

and

RELIANCE NATIONAL INSURANCE CO.
Carrier

and

MISSISSIPPI INSURANCE GUARANTY ASSOCIATION

APPEARANCES:

RICHARD McBRIDE, Pro Se
For the Claimant

Donald P. Moore, Esq.
For the Employer/Carrier

Before: **DAVID W. DI NARDI**
District Chief Judge

DECISION AND ORDER ON THIRD REMAND - AWARDING BENEFITS

This is a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." Hearings were held on September 23, 1996 in Mobile, Alabama, and on November 8, 1996 and March 11, 1997 in Gulfport, Mississippi, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

EVIDENTIARY ISSUE - THE LAW OF THE CASE DOCTRINE

As is discussed below in the section entitled **PROCEDURAL HISTORY**, the above- captioned matter has experienced a tortuous and lengthy journey along the shoals of navigable waters. It is still my judgment that my initial April 17, 1997 **Decision and Order Awarding Benefits** is correct as it complies 1) with the "substantial evidence rule of the **Administrative Procedure Act** and 2) with the landmark and most significant decision of the U.S. Court of Appeals for the Fifth Circuit in **Conoco, Inc. v. Director, OWCP (Prewitt)**, 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999), wherein that Court rejected the long-standing rule imposed by the Board, **i.e.**, that the Employer's medical expert must render that **unequivocal** medical opinion that **completely rules out** any and all connection between the alleged bodily harm and the maritime employment in order to rebut the Section 20(a) statutory presumption in the employee's favor. Moreover, the Board's June 5, 1998 **Decision and Order** reversing and vacating my initial decision does not comply with the Board's subsequent **Decision and Order** in **O'Kelley v. Department of the Army, NAF**, 33 BRBS 39 (2000), a matter over which I presided.

Under the "Law of the Case" doctrine, a Court of Appeals will follow its prior decision without reexamination in subsequent appeal **unless evidence in subsequent trial was substantially different, controlling authority has since made contrary decision of law applicable to such issues, or decision was clearly erroneous and would work manifest injustice. (Emphasis added) Royal Insurance Company of America v. Quinn - L Capitol Corporation**, 3 F.3d 877 (5th Cir. 1993), **Rehearing and Suggestion for Rehearing En Banc Denied**, 9 F.3d 105 (Table)(Nov. 5, 1993); **cert. denied**, 114 S.Ct. 1541 (Mem.)(April 18, 1994).

As that Court states on page 5:

> The **law** of the **case** doctrine was developed to "maintain consistency and avoid [needless] reconsideration of matters once decided during the course of a single continuing lawsuit." 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4478, AT 788 (1981). "These rules do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment." *Id.* Under this doctrine, we will follow a prior decision of this court without reexamination in a subsequent appeal unless "(i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work manifest injustice."

> **North Miss. Communications v. Jones**, 951 F.2d 652, 656 (5th Cir.), **cert. denied**, 506 U.S. 863, 113 S.Ct. 184, 121 L.Ed. 2d 129 (1992). The doctrine extends to those issues "decided by necessary implication as well as those decided explicitly. ***881 Dickinson v. Auto Ctr. Mfg. Co.,**, 733 F.2d 1092, 1098 (5th Cir. 1983) (citation, quotation marks, and emphasis omitted).

As the BRB has acknowledged, "the Board has held that it will adhere to its initial decision when a case is before it for a second time **unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous, or the first decision was clearly erroneous and to let it stand would produce a manifest injustice.** (Emphasis added) **Weber v. S.C. Loveland Company, et al.**, 35 BRBS 75 (2001). **See also Jones v. U.S. Steel Corp.**, 25 BRBS 355 (1992); **Williams v. Healy-Ball-Greenfield**, 22 BRBS 234 (1989)(Brown, J., dissenting). **See also White v. Murtha**, 377 F.2d 428, 432 (5th Cir. 1967); **Fogel v. Chestnutt**, 668 F.2d 100, 109 (2nd Cir. 1981), **cert. denied**, 459 U.S. 1059 (1982).

While the "Law of the Case" doctrine is designed to put some finality into these cases, the exceptions to this rule have been noted above, and although the Employer has urged the Board to vacate its June 5, 1998 decision, the Board has not done so. As the board has held that Claimant's psychological problems constitute, as a matter of law, a work-related injury, that is "The Law of the Case." As is discussed further below, I disagree with that ruling.

It is with the utmost of trepidation and apprehension that I respectfully suggest that the Board erred in its June 5, 1998 **Decision and Order** herein. I agree completely with Judge Brown, in his dissent in **Williams, supra**, that the "Law of the Case" doctrine is a discretionary rule used to promote finality in the judicial process, and I respectfully submit that the Board should exercise such discretion herein to put an end to this litigation. However, in the interim, I am constrained to accept that ruling, thereby resulting in this decision and compensation award. While one cannot predict the future, it is my belief that my initial decision complies with **Conoco** and **O'Kelley** and time will tell whether or not the Fifth Circuit is in agreement.

PROCEDURAL HISTORY

This Administrative Law Judge, by **Decision and Order Awarding Benefits** dated April 17, 1997, concluded that Richard McBride ("Claimant" herein) (1) sustained minor injuries to his shoulder and neck on March 3, 1994 while working at the maritime facility of Halter Marine, Inc. ("Employer"), (2) that Claimant had also injured his back during a minor lifting episode on April 13, 1994, (3) that Claimant's alleged psychological problems, based upon the well-reasoned, well-documented and forthright opinions of Dr. Henry A. Maggio, Board-Certified in Psychiatry and Neurology, did not constitute a new and discrete injury as the natural and unavoidable consequences or the natural sequela of Claimant's minor work-related injuries on March 3, 1994 and April 13, 1994, (4) that any disability Claimant was experiencing was due solely to non-work-related conditions and (5) that the Employer properly terminated Claimant on September 18, 1994 because he had violated the Employer's company policy by using a illicit drug, which use was detected as part of a routine physical examination given to Claimant after he returned to work. On June 18, 1997 I issued a **Supplemental Decision and Order Granting Attorney Fee**.

In this Court*s original Decision and Order, it was determined that Claimant suffered two minor injuries while employed with Halter Marine, the first on March 3, 1994 and the second on April 14, 1994. In discussing each of the incidents, this Court concluded that Claimant*s versions of the alleged accidents were "certainly exaggerated and these are reflected in the various reports contained in the record." (Original Decision and Order, p. 24.) Nonetheless, it was determined that Claimant was entitled to temporary total disability benefits from April 14, 1994, when he first lost time from work, through September 18, 1994, the date Claimant was allowed to return to work with Halter Marine. Thereafter, the Claimant was found to have been "properly terminated for violating company rules." (Original Decision and Order, pp. 28-29). This Court also concluded that suitable alternate employment had been provided for Claimant on September 19, 1994, and because Claimant was terminated for failing to pass a drug screen, he was entitled to no further disability benefits. **Id.**

Importantly, at this point, it must be noted that Claimant had been released by his treating orthopedic physician, Dr. M.F. Longnecker, with only temporary restrictions for 6-8 weeks and thereafter, Claimant would be returned to normal duty. Dr. Longnecker had subsequently issued a report indicating that Claimant had no permanent impairment or permanent restrictions. (EX-9, p. 18).

On November 8, 1994, an informal conference was held on this

matter. There was no mention of any psychological impairment or disability. (**See** Memorandum of Informal Conference attached as Exhibit "A" to EX J.) Furthermore, Claimant entered into a Section 8(i) settlement (from which Claimant later withdrew) on March 9, 1995, wherein there was no mention of any psychological harm, impairment or the need for psychological treatment. (**See** attachment as Exhibit "B" to EX J.) Similarly, the Pre-Hearing Statement dated January 5, 1995 also does not make any reference to any psychological problems or treatment (ALJ EX 3).

The first administrative hearing on this matter was held on September 23, 1996. At such time, this Court marked documents for identification as ALJ exhibits. Included in those documents were certain exhibits that had not been previously seen by the employer or counsel for the Plaintiff. Thus, this Court did not offer any of those exhibits into evidence at that point. Further, this Court acknowledged that the Employer was learning for the first time that there might be some alleged psychological condition in addition to the alleged orthopedic problems resulting from the work related incident in April 1994. (TV. p. 17.) At that time this Court indicated that November 1, 1996 would be the cut-off date for all discovery in this matter and reset the hearing for November 8, 1996. The ALJ exhibits were furnished to Employer's counsel for the purpose of having copies of those documents made as the Employer had not received several of the documents prior to the hearing.

At the second reconvened hearing on this matter, on November 8, 1996, the Employer pointed out to this Court that the only issues ever raised pre-hearing were the extent of disability for Claimant*s back injury and the Section 49 discrimination claim, then for the first time at the hearing on September 23, 1996, Claimant*s new counsel mentioned psychological problems. Furthermore, the Employer informed this Court that the Employer had received no medical reports from Mr. Hays, Claimant*s attorney at the time, or Mr. McBride regarding any of the psychological matters outlined in the last hearing.

Counsel for the Employer stated: "There has been no proof that this man has a psychological injury submitted to me to date. That injury has never been pleaded a - - non-organic injury has never been pleaded as an injury in this claim." Claimant*s counsel responded "with all due respect to counsel, Your Honor we just recently received - yesterday- from Dr. Hearne- may I present this to counsel?" Claimant*s counsel further acknowledged "I have just tendered to counsel as well as to the Court, your honor - a faxed copy of the first medical documentation that we have, in fact, received from Dr. Hearne. And that was faxed to us yesterday." Furthermore, Attorney Moore stated:

> And if you will please note- I*m assuming that these are the dates of treatment, October 1 is the first day that this doctor saw this man. It was after that hearing on September 23. What*s not new is this injury. This injury occurred more than two years ago, Judge, and this is the first psychological report that we get from a visit on October 1, 1996.
>
> That*s new and that*s the first time I*ve been handed this. Counsel did try to set this man*s deposition - this doctor over in Brookhaven. I had never heard of the doctor before. I had never been furnished one medical report from the guy. I can*t go over there and be blindsided.

Furthermore, Employer correctly points out that the discovery deadlines in this matter were continually ignored. In that respect, Attorney Moore stated:

> And you also said the absolute deadline was November 1. This guy had more than thirty days. He had from September 23 until November 1 to get the medical stuff that was out there. What he did was go - send his guy to a brand new doctor and generate something completely new.
>
> He hasn*t come in here with one medical record that has been in existence out there, that he felt like he needed to give. Now, he said that the psychological problems have been going on all along. Where are the medical records from some psychologists who*s seen him along since 1994?
>
> They*re non-existent, or if they*re existent, I don*t have them because Mr. Hays hasn*t given them to me and with regard to his compliance with this discovery, Judge, not only did he not comply with your November 1, order but he has still never furnished me the original discovery [responses].

Similarly, Mr. Hays, Claimant*s attorney, stated “this is the first - yesterday was the first written documentation that I have ever had from Dr. Hearne from Mr. McBride. I simply couldn*t - I didn*t have it, your honor.” Finally, this Court stated “and apparently this case is no more ready to be tried now than it was back in September because Mr. Moore has just received a rather significant report from Dr. Hearne - and that is H-e-a-r-n-e. And for the first time, he has seen something in writing that relates to these alleged psychological problems.” This Court once again extended discovery and set the final discovery for January 8, 1997, and continued the hearing until

the week of March 3, 1997.

Despite the deadlines imposed by this Court for the submission of the psychological evidence, this Court did ultimately allow Claimant to submit medical records and deposition testimony of Drs. Hearne and Gupta. Following an evidentiary hearing in this case (on the third trial setting), this Court considered those opinions and medical evidence but accepted the medical opinion of Dr. Maggio over the medical evidence submitted by Claimant to determine that Claimant*s alleged psychological condition was unrelated to his work injury of 1994.

Claimant timely filed an appeal with the Benefits Review Board and the Board, by **Decision and Order** dated June 5, 1998 reversed and vacated said decision and remanded the claim for reconsideration of the issues as delineated, directed and mandated by the Board.

In view of the Board's non-published opinion, and for ease of reference by all interested parties, I shall quote liberally from the Board's decision to put this case in proper perspective.

Causation

"We first address claimant's contentions regarding the administrative law judge's denial of this claim for compensation based on a work-related psychological injury. BRB No. 97-1226. Claimant bears the burden of proving that he has sustained a harm or pain. **See Sinclair v. United Food and Commercial Workers**, 23 BRBS 148 (1990). Once claimant establishes these two elements of his **prima facie** case, the Section 20(a), 33 U.S.C. §920(a), presumption applies to link the harm or pain with claimant*s employment. **See Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990); **Perry v. Carolina Shipping Co.**, 20 BRBS 90 (1987). The Section 20(a) presumption is applicable in psychological injury cases. **Cotton v. Newport News Shipbuilding & Dry Dock Co.**, 23 BRBS 380, 384 n.2 (1990). An employment injury need not be the sole cause of a disability; rather, if the employment injury aggravates, accelerates or combines with an underlying condition, the entire resultant condition is compensable. **See Independent Stevedore Co. v. O*Leary**, 357 F.2d 812 (9th Cir. 1966). Thus, claimant*s psychological injury need only be due in part to work-related conditions to be compensable under the Act. **See Peterson v. General Dynamics Corp.**, 25 BRBS 78(1991), **aff*d sub nom. Ins. Co. of North America v. US. Dept. of Labor, OWCP**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992),

cert. denied, 507 U.S. 909 (1993). Upon invocation of the presumption, the burden shifts to employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment.[1] **See Swinton v. .1 Frank Kelly, Inc.**, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), **cert. denied**, 429 U.S. 20 (1976). If the presumption is rebutted, the administrative law judge must weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole. **See Devine v. Atlantic Container Lines, G.LE.**, 23 BRBS 279 (1990); **see also Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, the administrative law judge invoked the Section 20(a) presumption linking claimant*s psychological condition to his employment with employer since claimant*s psychological condition constituted a harm and the occurrence of two work incidents was not in dispute. The administrative law judge next relied on the opinion of Dr. Maggio to find that employer severed the connection between claimant*s psychological condition and his maritime employment. **See** Decision and Order at 23. The administrative law judge thereafter evaluated the evidence of record as a whole and found that claimant*s psychological condition is not work-related. Accordingly, the administrative law judge denied claimant*s claim for compensation based upon his psychological condition.

In reviewing claimant*s appeal, the relevant evidence of record addressing the cause of claimant*s psychological condition are the medical records and opinions of Drs. Gupta, Hearne and Maggio. Dr. Maggio, based upon a three-hour examination of claimant and his review of claimant*s medical and social history, acknowledged that claimant suffers from anxiety, depression and a substance-induced psychosis and thereafter opined that claimant has undergone no episode sufficient to justify a diagnosis of Post-Traumatic Shock Syndrome Disorder. Dr. Maggio additionally concluded that claimant is neither mentally retarded nor psychotic and is capable of returning to his usual employment. **See** EX 14 at 6.

In concluding that claimant*s psychological condition is not work-related, the administrative law judge found rebuttal of the Section 20(a) presumption based upon the testimony of Dr. Maggio. In order to establish rebuttal, however, a medical

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[1]The U.S. Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, has categorically rejected placing this unreasonable and insurmountable burden on the Employer in **Conoco, Inc. v. Director, OWCP (Prewitt)**, 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1990).

opinion must unequivocally state that no relationship exists between an injury and claimant*s employment thus, Dr. Maggio*s opinion, in order to be sufficient to rebut the Section 20(a) presumption, must establish that claimant*s employment did not cause claimant*s condition nor aggravate, accelerate, or combine with an underlying condition. **See 0'Leary**, 357 F.2d at 812. In the instant case, however, Dr. Maggio*s opinion does not sever such a potential relationship. Rather, while diagnosing claimant with multiple conditions including anxiety and depression, Dr. Maggio*s opinion is silent as to the effects of claimant*s employment with employer on these conditions. Dr. Maggio did state that claimant did not experience an episode sufficient to justify a diagnosis of Post-Traumatic Shock Syndrome Disorder. Dr. Maggio also discussed the effect of other factors, i.e., substance abuse and/or underlying personality components, on claimant*s conditions. However, his opinion does not discuss the working condition asserted as affecting his condition and thus does not sever the presumed causal connection between claimant*s condition and his employment. As Dr. Maggio at no point stated that claimant*s psychological condition was not caused or aggravated by the work incidents at issue here, as a matter of law his opinion cannot support a finding that the Section 20(a) presumption was rebutted. As Dr. Maggio*s opinion is the only relevant evidence proffered by employer on rebuttal, there is no need to remand this case for reconsideration of the issue of causation. Since employer offered no other evidence, the administrative law judge*s finding that Section 20(a) was rebutted is not supported by substantial evidence in the record and is reversed. Consequently, the administrative law judge*s conclusion that claimant*s psychological condition is not work-related is also reversed. Accordingly, the case must be remanded for consideration of the remaining issues.

Accordingly, the administrative law judge’s finding that claimant’s psychological condition is not work-related is reversed, and the case is remanded for consideration of the remaining issues. BRB No. 97-1226. The administrative law judge’s Supplemental Decision and Order Granting Fee is vacated, and the case is remanded for further consideration. BRB No. 97-1226A. The Compensation Order - Award of Attorney Fees of the district director is affirmed. BRB No. 97-1491.

On April 5, 1999 this Administrative Law Judge issued a **Decision and Order On Remand - Awarding Benefits** and on April 26, 1999 a **Decision and Order on Motion For Reconsideration**. In the Decision and Order on Motion for Reconsideration, this Court indicated that it was compelled by this Board to find that Claimant*s psychological condition constitutes a work related injury. This Court qualified this holding by stating that “the Board has clearly substituted its opinion for that of this fact-

finder who presided over the Hearing, who heard the testimony and observed the demeanor of a less than candid Claimant." (**Decision and Order on Motion for Reconsideration**, p. 16.)

After reluctantly finding that Claimant*s psychological condition constituted a work related injury, this Court reiterated his prior holding that "this closed record conclusively establishes Claimant can return to work at the Employer*s facility, that he did return to work, underwent a drug screening and failed the test and was properly terminated on September 18, 1994 for illicit drug use." (**See Decision and Order on Motion for Reconsideration**, p. 17.) In reviewing whether Claimant is entitled to past and future medical care, this Court found that Claimant had never requested or received approval for treatment of his alleged psychological problems. Consequently, this Court held that Halter Marine was not responsible for any past medical expenses. This Court, however, awarded future medical expenses related to the work injury, as mandated by the Board. (**See Decision and Order on Motion for Reconsideration**, pp. 20-25.)

On May 7, 1999, Claimant filed an appeal of the Decision and Order on Motion for Reconsideration and filed a quasi-Notice of Appeal/Petition for Review with attached newspaper clippings, recent letters from physicians and a Complaint from a lawsuit unrelated to the instant claim. Halter Marine filed a Motion to Strike Claimant*s Notice of Appeal on May 11, 1999, citing the fact that Claimant was attempting to introduce new evidence to this Board. Halter Marine filed a Notice of Cross-Appeal on May 14, 1999. On June 24, 1999, the Board issued an Order indicating that the documents attached to Claimant*s Notice of Appeal/Petition for Review were not being accepted but were being returned to Claimant, as those documents were not considered by the ALJ. The Board indicated that Claimant*s submission should be treated as a Motion for Modification, dismissed the appeals filed by both Claimant and Halter Marine and remanded the case to this Court for modification proceedings. On January 18, 2000, this Court denied modification on the basis that the medical evidence submitted by Claimant had already been admitted into evidence and the other documents submitted by Claimant were irrelevant. Thereafter Claimant filed an appeal of this Court*s decision on modification and requested that his prior appeal be reinstated. This appeal was consolidated with Claimant*s numerous other appeals and the Board issued its Decision and Order on January 10, 2001, necessitating a fourth decision by this Administrative Law Judge.

Claimant timely appealed from said decision and, while this appeal was pending, he filed a **Motion For Modification** because this Administrative Law Judge did not award him all of the

relief that he seeks. On July 26, 2000 I issued a **Decision and Order Denying Motion For Modification**. Claimant again timely appealed to the Board and, as he was **Pro Se** this time, the Benefits Review Board issued a **Decision and Order** on January 10, 2001 and again the Board vacated my decision and again remanded this claim to this Administrative Law Judge for further proceedings.

As the Board's decision is non-published and for ease of reference by all interested parties, particularly the U.S. Court of Appeals for the Fifth Circuit, I shall quote liberally from the Board's decision to put this case into proper perspective. (I have omitted the Board's footnotes.)

"This case is before the Board for the third time. To briefly reiterate the facts relevant to the instant appeals. claimant sustained neck and back injuries resulting from two work-related incidents occurring on March 3, 1994, and April 13, 1994, respectively; claimant further alleged that he suffered a psychological injury as a result of these two work-related incidents. Claimant returned to work in a modified duty position at employer*s facility on September 19, 1994, but, following a positive drug test, he was terminated on September 22, 1994, for violation of a company rule. In his initial Decision and Order issued on April 17, 1997, the administrative law judge found that claimant*s physical injuries were related to his employment with employer, but that any psychological condition from which claimant may suffer was not related to the 1994 incidents. Accordingly, the administrative law judge awarded claimant temporary total disability compensation for disability due to his physical injuries from April 14, 1994, to September 18, 1994, at which time the administrative law judge determined that employer had established the availability of suitable alternate employment within its own facility. 33 U.S.C. §908(b).

"Claimant appealed to the Board, challenging the administrative law judge*s finding that his current psychological condition is unrelated to the two work incidents which he experienced while working for employer, and the administrative law judge*s consequent denial of medical treatment and compensation under the Act for that alleged work-related condition. In its decision issued on June 5, 1998. the Board reversed the administrative law judge*s finding that claimant*s psychological condition is not work-related, and remanded the case for consideration of the remaining issues. **McBride v. Halter Marine, Inc.**, BRB Nos. 97-1226/A (June 5, 1998)(unpublished)...

"In his Decision and Order on Remand issued on April 5, 1999, the administrative law judge determined that claimant*s psychological condition does not prevent him from performing the

modified duty position at employer*s facility which the administrative law judge had previously found to constitute suitable alternate employment. Accordingly, the administrative law judge denied compensation benefits for claimant*s psychological condition. On the basis of the Board*s holding as a matter of law that claimant*s psychological condition is related to his employment, the administrative law judge next found employer to be responsible for any reasonable and necessary future medical treatment of claimant*s psychological condition. 33 U.S.C. §907. The administrative law judge denied Section 7 medical benefits, however, for the past medical treatment of claimant*s psychological condition.

"Both claimant and employer again appealed to the Board, claimant contesting the denial of compensation and past medical benefits, BRB No. 99-0852, and employer challenging the award of future medical benefits for claimant*s psychological condition, BRB No. 99-0852A. Thereafter, claimant filed with the Board a request for modification accompanied by additional documents. Acting upon claimant*s motion[2], the Board dismissed the appeals filed by both claimant and employer, and remanded the case for modification proceedings. 33 U.S.C. §922; 20 C.F.R. §§725.3 10, 802.301.

"In a Decision and Order Denying Motion for Modification issued on January 18, 2000, the administrative law judge denied modification on the basis that the medical evidence accompanying claimant*s modification request had already been admitted into evidence and the other documents submitted by claimant are irrelevant. Thereafter, claimant filed an appeal of the administrative law judge*s denial of modification and additionally requested that his prior appeal, BRB No. 99-0852, be reinstated. By Order dated February 15, 2000. the Board acknowledged claimant*s appeal of the modification denial, BRB No. 00-0500, reinstated claimant*s appeal in BRB No. 99-0852, and consolidated the two appeals for purposes of rendering a decision. Claimant subsequently filed an additional motion for modification with the administrative law judge, which was summarily denied on July 26, 2000: claimant subsequently appealed this decision to the Board. By Order dated September 5, 2000, the Board acknowledged claimant*s additional appeal,

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[2]I note that the Board's unilateral action does not comport with its decision in **Craig v. United Church of Christ,** 13 BRBS 567 (1981) (when a decision is on appeal to the Board, a **Motion for Modification** must be filed with the presiding Administrative Law Judge for a determination by that Administrative Law Judge as to whether such motion satisfies the requirements of Section 22 of the Act) and whether further proceedings before the ALJ are appropriate.

assigned that appeal the BRB No. 00-1092, and consolidated that appeal with claimant*s appeals in BRB Nos. 99-0852 and 00-0500 for purposes of decision. Thus, in the appeals presently pending before the Board, claimant challenges the administrative law judge*s Decision and Order on Remand denying disability benefits and past medical benefits for claimant*s psychological condition, as well as the administrative law judge*s two decisions denying claimant*s request for modification. Employer responds, urging affirmance of the administrative law judge*s denial of modification.

"We first address claimant*s challenge to the administrative law judge*s denial of disability benefits for claimant*s psychological condition in the Decision and Order on Remand. As it is undisputed that claimant cannot perform his usual work due to his work injury, the burden shifted to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. **See Darby v. Ingalls Shipbuilding, Inc.**, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); **M~fangos v. Avondale Shipyards**, 948 F.2d 941, 25 BRBS 78 (CRT)(Sth Cir. 1991); **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031, 14 BRBS 156 (CRT) (5th Cir. 1981). Employer may meet its burden of showing suitable alternate employment by offering claimant a job which he can perform within its own facility. **See Darby**, 99 F.3d at 688, 30 BRBS at 94(CRT); **Darden v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 224 (1986). The Board has held that where claimant has been discharged from a light duty job within employer*s own facility for violation of a company rule, and not for reasons related to his disability, employer may use that position to satisfy its burden of showing suitable alternate employment if it has established that claimant is, in fact, capable of performing the duties of that position. Thus, if employer has demonstrated that claimant is able to perform the job within its facility, the fact that the position is no longer available to claimant, due to his discharge for reasons unrelated to his disability, does not impose upon employer the additional requirement to show different suitable alternate employment outside its facility. **See Brooks v. Newport News Shipbuilding & Dry Dock Co.**, 26 BRBS 1(1992), **aff*d sub nom. Brooks v. Director, OWCP**, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993); **see also Manship v. Norfolk & Western Ry. Co.**, 30 BRBS 175 (1996). Regarding this issue, the physical ability to perform a job is not the exclusive determinant whether the identified position constitutes suitable alternate employment; rather, the administrative law judge must consider whether claimant has the ability, from a mental or psychological standpoint, to successfully perform the requirements of the position. **See Ledet v. Phillips Petroleum Co.**, 163 F.3d 901, 32 BRBS 212 (CRT)(Sth Cir. 1999):**Armfield v.**

Shell Offshore, Inc., 30 BRBS 122 (1996).

"Thus, in the case at bar, the relevant inquiry in determining whether the modified duty position in employer*s facility satisfies employer*s burden of establishing the availability of suitable alternate employment is whether claimant*s work-related psychological problems prevent him from performing the duties of that job. **See Armfield**, 30 BRBS at 123. The administrative law judge determined, in this regard. that claimant*s psychological condition does not preclude his performance of the job in employer*s facility. In reaching this conclusion, the administrative law judge credited the opinion of Dr. Maggio, a psychiatrist who reviewed claimant*s medical records and, on February 7, 1997, conducted a psychiatric examination of claimant on behalf of employer. The administrative law judge found the opinions of claimant*s treating psychiatrist Dr. Gupta and treating psychologist Dr. Hearne that claimant is totally disabled by his psychological condition were outweighed by the contrary opinion of Dr. Maggio and by the administrative law judge*s observation of claimant*s demeanor. In giving determinative weight to Dr. Maggio*s opinion that claimant*s psychological disorders do not prevent him from working for employer, the administrative law judge found it noteworthy both that claimant*s psychological condition did not arise until two years after he had stopped working and that this condition is due solely to personal factors. **See** Decision and Order on Remand at 23-24. The administrative law judge*s finding, that claimant*s psychological condition did not arise until two years after he stopped working, is not supported by substantial evidence. Contrary to the administrative law judge*s finding, the record reflects that Dr. Longnecker prescribed the antianxiety medication Ativan to claimant as early as June 1994. **See** EX 9. A few days after claimant*s supply of Ativan ran out, he sought treatment on November 11, 1994, at Singing River Hospital Emergency Department, where he was diagnosed with acute anxiety, probably secondary to Ativan withdrawal, and was referred for follow-up treatment at Singing River Mental Health Center. *See* ALJXS 12, 49. On November 29, 1994, claimant initiated treatment with Singing River Mental Health Center; he was initially seen for therapy and subsequently was also seen by Dr. Feldberg. a Mental Health Center psychiatrist, for the psychopharmacological management of his diagnosed post-traumatic stress disorder. **See** ALJX 49. In addition, the record contains a referral for mental health treatment from claimant*s orthopedist, Dr. Longnecker, dated December 7, 1994, as well as a follow-up note dated January 7, 1998 from Dr. Longnecker stating that, after first being seen on May *5,* 1994, claimant progressively developed depression and psychotic behavior requiring referral to a psychiatrist. *See* CX 9; ALJX 12. Thus, as the administrative law judge*s finding that claimant*s

psychological condition did not arise until two years after he stopped working is not supported by the record, the administrative law judge erred in relying, in part, on this finding to support his ultimate conclusion that claimant*s psychological condition is not disabling. **See generally James J Flanagan Stevedores, Inc. v. Gallagher**, 219 F.3d 426, 430, 34 BRBS 35, 37 (CRT)(Sth Cir. (2000).

"Furthermore, in electing to give determinative weight to Dr. Maggio*s opinion that claimant is not disabled, the administrative law judge failed, on remand, to address evidence in the record which contradicts Dr. Maggio*s opinion regarding claimant*s ability to return to work. Specifically, the record reveals that on February 12, 1997, five days after Dr. Maggio*s examination of claimant, Dr. Gupta admitted claimant to Charter Hospital, as claimant was experiencing psychotic symptoms including auditory an&visual hallucinations and paranoia. During this hospitalization, claimant was treated for post-traumatic stress disorder and major depressive disorder, and was prescribed antipsychotic medications in addition to the antidepressant and antianxiety medications that already had been prescribed. On March 1, 1997, claimant was discharged from the hospital for outpatient mental health treatment, but he was not released to return to work. **See** CX 6.

"We therefore vacate the administrative law judge*s determination, in his Decision and Order on Remand, that claimant*s psychological condition is not disabling, and remand the case for consideration of all of the evidence of record regarding whether employer met its burden of establishing that claimant, in light of his work-related psychological condition, is capable of performing the restricted duty position in employer*s facility. **See generally Ledet**, 163 F.3d at 905, 32 BRBS at 214-215(CRT).

"We next address claimant*s assignment of error to the administrative law judge*s denial of his request for modification. Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant*s physical or economic condition. **See Metropolitan Stevedore Co. v. Rambo** [Rambo I], 515 U.S. 291, 30 BRBS 1 (CRT) (1995). It is well-established that the party requesting modification bears the burden of proof. **See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]**, 521 U.S. 121, 31 BRBS 54 (CRT) (1997); **Kinlaw v. Stevens Shipping & Terminal Co.**, 33 BRBS 68(1999), **aff*d mem.**, No. 99-1954 (4th Cir. Dec. 8,2000). To reopen the record under Section 22, the moving party must allege a mistake of fact or change in condition and assert that the

evidence to be produced or of record would bring the case within the scope of Section 22. **See Kinlaw**, 33 BRBS at 73; **Duran v. Interport Maintenance Co.**, 27 BRBS 8 (1993).

"Where a party seeks modification based on a change in condition, an initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating that there has been a change in claimant*s condition. **See Jensen v. Weeks Marine, Inc.**, 34 BRBS 147 (2000); **Duran**, 27 BRBS at 14.

"Where modification based on a mistake of fact is sought, the decision as to whether to reopen a case under Section 22 is discretionary, and is contingent upon the fact-finder*s balancing the need to render justice against the need for finality in decision making. **See Kinlaw**, 33 BRBS at 72-73; **see also General Dynamics Corp. v. Director, OWCP [Woodberry]**, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982); **McCord v. Cephas**, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); **Lombardi v. Universal Maritime Service Corp.**, 32 BRBS 83 (1998).

"In the present case, the administrative law judge concluded that claimant*s newly submitted evidence is insufficient to show a change in condition or a mistake of fact. Specifically. the administrative law judge found that the medical records have already been made part of the record and that the remaining evidence submitted is irrelevant to this proceeding. Contrary to the administrative law judge*s finding, however, claimant, in requesting modification, submitted medical records which were not previously made part of the record; specifically, claimant introduced medical records from the Singing River Mental Health Center dating from 1997 to 1999 and Dr. Hearne*s report dated October 21, 1999. Because these records were erroneously found by the administrative law judge to have previously been admitted into evidence, we must vacate the administrative law judge*s denial of modification. If, on remand, the administrative law judge again denies disability benefits on the basis of the existing record, he must reconsider whether the newly submitted medical evidence supports reopening the record pursuant to Section 22. **See generally Kinlaw, 33 BRBS at 68; Wynn v. Clevenger Corp.**, 21 BRBS 290 (1988).

"Lastly, we consider claimant*s contention that the administrative law judge erred in denying Section 7 medical benefits for the past medical treatment of claimant*s psychological condition. Under the Act, claimant is entitled to reimbursement for all reasonable and necessary medical treatment related to his work injury. **See Kelley v. Bureau of National Affairs**, 20 BRBS 169 (1988). Specifically, Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[tlhe employer shall

furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." Thus, claimant is entitled to medical benefits regardless of whether his injury is economically disabling so long as the treatment is necessary. **See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]**, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer*s liability for payment or reimbursement of medical expenses incurred by claimant. The Board has held that Section 7(d) requires that a claimant request his employer*s authorization for medical services performed by any physician, including the claimant*s initial choice. **See Ezell v. Direct Labor, Inc.**, 33 BRBS 19, 28 (1999); **Maguire v. Todd Shipyards Corp.**, 25 BRBS 299 (1992): **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981)(Miller, J. dissenting), **rev*d on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146 (1983). Where a claimant*s request for authorization is refused by the employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was reasonable and necessary in order to be entitled to such treatment at employer*s expense. **See Ezell**, 33 BRBS at 28; **Schoen v. US. Chamber of Commerce**, 30 BRBS 112 (1996);**Anderson v. Todd Shipyards Corp.**, 22 BRBS 20(1989). An employer must consent to a change of physician where claimant has been referred by his treating physician to a specialist skilled in treating claimant*s injury. **See Ezell**, 33 BRBS at 28: **see generally Armfield v. Shell Offshore, Inc.**, 25 BRBS 303 (1992)(Smith, J., dissenting on other grounds); **Senegal v. Strachan Shipping Co.**, 21 BRBS 8 (1988); 20 C.F.R. §702.406(a).

"In the instant case, the administrative law judge determined that employer was not liable for the medical treatment rendered to claimant by Singing River Mental Health Center solely on the basis that claimant failed to request authorization from employer for that treatment. **See** Decision and Order on Remand at 25, 27. However, contrary to the administrative law judge*s statement that claimant never sought authorization for this treatment except in legal pleadings filed herein, the record does contain evidence, not considered by the administrative law judge. that claimant did request authorization for his treatment with Singing River. First, the administrative law judge did not address evidence that claimant was referred to Singing River for mental health treatment by his authorized treating orthopedist. Dr. Longnecker. **See** ALJX 12; CX 9; EX 20 at 37-38, 52; Tr. at 130. 131, 180. Furthermore, the administrative law judge did not consider claimant*s hearing testimony that employer was provided with a copy of Dr.

Longnecker*s referral to Singing River and that claimant called employer to request payment of Singing River*s bills and his medications, but that employer denied those requests. **See** Tr. at 134-135, 180. As the administrative law judge did not consider this evidence which is relevant to claimant*s request for medical benefits, we vacate the administrative law judge*s denial of payment for treatment provided by Singing River Mental Health Center; on remand, the administrative law judge must address all of the evidence of record regarding claimant*s request for authorization and his referral to Singing River by his authorized treating orthopedist. **See Ezell**, 33 BRBS at 28; **Armfield**, 25 BRBS at 309; 20 C.F.R. §702.406(a).

"Next, in denying claimant*s request for reimbursement for the services rendered by Drs. Hearne and Gupta, the administrative law judge found, first, that claimant failed to seek prior authorization from employer for treatment with these physicians, and, second, that it was unreasonable for claimant to obtain treatment from these medical providers, who are located at a distance equal to a four-hour drive from claimant*s residence when other qualified providers are available in the vicinity of claimant*s home. The administrative law judge ruled, in the alternative, that if this treatment was held to be reasonable, claimant*s travel expenses are denied and medical benefits are limited to those reasonable costs that would be incurred near claimants home.

"Pursuant to our previous discussion of this issue, the administrative law judge*s denial of Section 7 benefits on these grounds is vacated; on remand, the administrative law judge must determine whether employer had previously refused authorization of claimant*s mental health treatment, and, if so, whether such refusal released claimant from the obligation of continuing to seek approval for his subsequent mental health treatment. **See Ezell**, 33 BRBS at 28; **Schoen**, 30 BRBS at 113; **Anderson**, 22 BRBS at 23. If, on remand, claimant is found to have been released from the obligation to seek employer*s approval for his subsequent treatment by Drs. Hearne and Gupta, the administrative law judge must reconsider whether this self-procured treatment was reasonable and necessary. **See Schoen**, 30 **BRI3S** at 113: **Anderson**, 22 BRBS at 2;: **see also Roger*s Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687. 18 BRBS 79(CRT) (5th Cir.), **cert. denied**, 479 U.S. 826 (1986); 20 C.F.R. §§702.402, 702.4 13. Moreover, the distance claimant must travel to a chosen physician does not in itself render the treatment unreasonable; thus, the administrative law judge erred in relying upon this rationale for the denial of all expenses for this treatment. As he found in the alternative, however, claimant*s medical expenses may reasonably be limited to those costs which would have been incurred had the treatment been provided locally. **See Schoen**, 30 BRBS at 114-115; **Welch v.**

Pennzoil Co., 23 BRBS 395, 401 n.3 (1990); 20 C.F.R. §702.403. In the present case, as the administrative law judge*s finding that competent medical care was available to claimant locally is supported by the uncontroverted deposition testimony of Drs. Hearne and Gupta. **See** CX 2 at 19-20; CX 3 at 34. We affirm the administrative law judge*s finding that any medical expenses and travel costs awarded for the treatment provided by Drs. Hearne and Gupta are limited to those expenses and travel costs that would have been incurred had the treatment been provided locally.

"Accordingly. the administrative law judge*s Decision and Order on Remand Awarding Benefits, Decision and Order Denying Motion for Modification, and Decision on Motion for Modification are affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this decision."

Post-remand evidence has been admitted as:

Exhibit No.	Item	Filing Date
ALJ EX A	This Court's **Order**	02/22/01
CX A	Claimant's response	03/09/01
EX A	Employer's response	03/23/01
CX B	Claimant's Motion for this Administrative Law Judge "to voluntarily withdraw from this case if he cannot or will not en-force (sic) a Federal Court Order for third time by the Board against the insurance company, Reliance National Insurance and Halter Marine."	03/26/01
EX B	Employer's response	03/26/01
EX C	Claimant's response	03/26/01
ALJ EX B	This Court's **Order** granting the the parties an extension of time for the filing of post-hearing evidence	03/27/01
ALJ EX C	This Court's **Order** in re: CX B	03/28/01
CX D	Claimant's second motion that I	04/12/01

	recuse myself herein[3]	
EX C	Employer's response	04/16/01
CX E	Claimant's letter to District Director Charles D. Lee	04/23/01
CX F	Letter from Attorney Robert F. O'Dell advising that he would be representing Claimant herein	04/30/01
EX D	Employer's letter requesting an extension of time for the parties to file their post-hearing briefs	06/28/01
CX F1	Attorney O'Dell's letter withdrawing as counsel herein due to a dispute with his client	06/30/01
CX F2	Attorney O'Dell's fee petition	06/30/01
ALJ EX D	This Court's **Order** allowing Attorney O'Dell to withdraw herein	07/05/01
CX G	Claimant's letter confirming that he had discharged Attorney O'Dell	07/25/01
CX H	Claimant's letter requesting a subpoena to be sent to obtain a final report from M.F. Longnecker, Jr., M.D.	07/26/01
ALJ EX E	This Court's cover letter sending the subpoena to Claimant	07/30/01
CX I	Claimant's letter filing the $75.00 bill he received from Dr. Longnecker	08/06/01
EX E	Employer's letter advising that that bill will not voluntarily be paid	08/08/01
EX F	Employer's **Motion to Re-Open the Record to Allow Submission of Additional Evidence** (the motion is **GRANTED**)	08/24/01
EX G	Employer's **Brief on Remand**	08/24/01

[3]That motion is also **DENIED** for the reasons stated in ALJ EX C.

CX J	Claimant's **Motion To Re-Open The Record To Allow Submission of Additional Evidence** (this motion is also **GRANTED**)	08/31/01
EX H	Attorney Moore's letter filing the Employer's	09/07/01
EX I	**Opposition To Claimant's Motion To Supplement the Record and Motion To Strike**	09/07/01
CX K	Claimant's status report	09/10/01
CX L	Claimant's letter filing additional evidence in support of his claim	09/21/01
ALJ EX F	This Court's **ORDER REOPENING RECORD**	10/24/01
EX J	Employer's **Motion to Strike** the alleged Section 48(a) discrimination as the Statute of Limitations on that issue had long expired	11/01/01
EX K	Attorney Moore's October 31, 2001 letter	11/08/01
CX M	Claimant's request for certain exhibits from the Metairie District Office, the Associates Solicitor and the OWCP	11/09/01
EX L	Attorney Moore's November 8, 2001 letter	11/13/01
CX N	Claimant's opposition to reopening the record	11/16/01
CX O	Claimant's "subpoena" to Crawford & Company	11/19/01
ALJ EX G	This Court's **ORDER**	11/19/01
EX M	Attorney Moore's November 19, 2001 status report	11/23/01
CX P	Claimant's status report	12/03/01
EX N	Attorney Moore's November 29, 2001 supplemental status report	12/03/01

EX O	Attorney Moore's request for two (2) subpoenas	12/03/01
ALJ EX H	This Court's **ORDER**	12/05/01
EX P	Attorney Moore's December 3, 2001 status report	12/06/01
CX Q	Claimant's letter in re his hospital bills	12/06/01
CX R	Mrs. McBride's letter relating to Claimant's hospitalization on November 27, 2001	12/06/01
EX Q	Attorney Moore's December 12, 2001 status report	12/17/01
ALJ EX I	This Court's **ORDER**	12/17/01
CX S	Claimant's brief on remand (with attachments)	01/07/02
EX R	Attorney Moore's January 8, 2002 status report	01/08/02
ALJ EX J	This Court's **ORDER**	01/10/02
CX T	Claimant's motion **in re** his medical bills	01/14/02
EX S	Attorney Moore's response thereto	01/14/02
EX T	Attorney Moore's letter filing the December 31, 2001 report of Dr. Henry A. Maggio	01/14/02
ALJ EX K	This Court's **ORDER**	01/17/02
CX U	Claimant's supplemental evidence entitled **"God's Little Instruction Book For Men," "Impossibilities vanish when a man and his God confront a mountain."**	01/31/02
EX U	Attorney Moore's letter filing the	02/01/02
EX V	January 10, 2001 Deposition Testimony of Dr. M.F. Longnecker	02/01/02
EX W	Attorney Moore's supplemental brief	02/11/02

CX V	Claimant's supplemental brief	02/12/02
CX W	Claimant's motion for a favorable decision on his claim but he does not wish to see any decrease in his SSA benefits[4]	02/15/02

The record was closed on February 15, 2002 as no further documents were filed.

The Findings of Fact and Conclusions of Law made by this Administrative Law Judge in the previous decisions, to the extent not disturbed by the Board, are binding upon the parties as the "Law of the Case," at least until such time as they are reviewed by the U.S. Court of Appeals for the Fifth Circuit under the substantial evidence rule, and they are incorporated herein by reference and as if stated herein **in extenso** and will be reiterated herein solely for purposes of clarity and to comply with the directions and mandate of the Board.

SUMMARY OF THE EVIDENCE

Claimant has offered the following supplemental evidence in support of his claim for benefits. Initially, I note the August 20, 2001 medical report of Dr. Longnecker wherein the doctor states as follows (CX J):

"To Whom It May Concern:

"The following information is submitted on Richard McBride. Enclosed you will find my original note on 13 June 1994 to Crawford & Co. in Metairie, LA. His problems from an orthopedic standpoint were basically ligamentous muscular in nature. He had however developed severe mental health problems and was referred to the mental health center in December of 1994. I also in January of 1998 indicated he had progressively developed mental depression and psychotic behavior requiring referral to a psychiatrist. Patient has not been seen since that time. It appears to me at this point that the patient has had psychiatric problems, mental depression, and at times psychotic behavior which required referral to a psychiatrist. Further follow up I'm sure can be obtained from the psychiatrist that has been treating him. Should this be the case, then I would feel from

[4]Such decrease in Claimant's SSA benefits is within the legal authority and obligation of the Social Security Administration to minimize so-called "double-dipping."

a psychiatric standpoint, and I am sure that this will be confirmed by his treating psychiatrist, that he is not capable for gainful employment. You will note that there is a prescription dated May 16, 1996 where I indicated final diagnosis was chronic lumbar sacro strain with 5% total body loss with limitations to avoid heavy lifting, bending, or stooping. I felt that he could do light work if his mental status was such that he could be re-trained to engage in that type activity."

Dr. Longnecker also issued the following report on a prescription form (CX J):

"Richard was first seen in my office originally, 5 May 94. He progressively developed mental depression (with) psychotic behavior requiring referral to a psychiatrist."

Dr. Longnecker also issued a report on June 13, 1994 wherein the doctor states as follows (CX J):

"The following information si (sic) submitted on Richard McBride. Mr. McBride was seen on 5 May 1994, for evaluation and disposition of back and neck pain. He apparently had sustained a work related injury on/about 3 March 1994, and re-injured himself in some type of altercation on/about 13 April 1994. He states he hurt his neck and low back area. He tried to work for two weeks but could not. He had been seen by the company doctor and was seen in the emergency room and placed on anti-inflammatory medications and muscle relaxants.

"Examination revealed tenderness in the neck and low back area. Neurologic exam was normal. X-rays were normal.

"My impression was this was ligamentous and muscular in nature and I recommended we start outpatient physical therapy and continue him on the anti-inflammatory medications. We last saw him May 26th. He was not better. He continued to complain of neck and low back pain for no apparent reasons. I did feel that an MRI of his neck and lower back should be done. I have a report from the physical therapist dated 26 May. He was also having some difficulty correlating his subjective complaints with physical findings. Following completion of the above study, we will probably finalize this case. This does appear to be ligamentous and muscular in nature, however, we must rule out any nerve root entrapment or discogenic problems," according to the doctor.

Claimant was hospitalized at Brentwood Behavioral Healthcare of Mississippi in Jackson, Mississippi on November 27, 2001 for evaluation of his psychological problems and bills relating to that hospitalization are in evidence as CX T.

Dr. K. Gupta states as follows in his December 10, 2001 **DISCHARGE SUMMARY** (CX S):

PROVISIONAL DIAGNOSIS:

AXIS I: 1. Posttraumatic stress disorder.

2. Major depressive disorder, with psychotic features.

AXIS II: Rule out personality disorder, not otherwise specified, with some anti-social features.

AXIS III: Heart problems, suspected blockage, and a history of liver damage.

AXIS IV: Severe.

AXIS V: GAF is 20.

HISTORY: This is a 38-year-old, married, African-American male admitted secondary to homicidal and suicidal ideations. He has had problems on the job and has not worked in years. He was being followed at his local mental health center. He states that in the last couple of weeks, he has started feeling down and depressed. He feels like his medication is not working. He has no energy. He is having hallucinations. He is crying a lot. He feel hopeless, helpless, and worthless. He is very anxious, irritable, and angry. He is also thinking that people are behind him. He is not sleeping well. He claims that his supervisor came around his house yesterday and the patient shot his gun into the air. He stated he really wanted to kill him. The family got worried and brought him to the hospital for further evaluation.

PHYSICAL EXAMINATION/IMPRESSION: Episodic chest pain of longstanding duration. Tinea cruris and corporis.

COURSE IN HOSPITAL: Mr. McBride was admitted on 11/27/2001, to observation level 3. At that time, he was started on Zyprexa, Zoloft, Haldol, and Ativan. One-to-one with social worker were (sic) ordered on 12/01/2001 and group therapy was also ordered on 12/01/2001. Capoten was started on 12/02/2001. He was started on insulin, with Accu-Checks q.i.d. on the 12/02/2001. Dietitian's consult before his next management of his diabetes. Glynase was also started. Medications were continually adjusted and sliding scale insulin was discontinued on the 12/03/2001. Accu-Checks were also discontinued. Geodone was added and continually adjusted. Trilafon was started on the 12/06/2001. On 12/10/2001, it was felt he could safely be discharged and followed up on an outpatient basis.

MEDICATIONS AT TIME OF DISCHARGE: Trilafon 8 mg q.h.s., Geodone 40 mg b.i.d., Cogentin 0.5 mg b.i.d., Zoloft 100 mg h.s., and Glynase 3 mg q.a.m.

FINAL DIAGNOSIS:

AXIS I: 1. Posttraumatic stress disorder.

2. Major depressive disorder, with psychotic features.

AXIS II: None.

AXIS III: Heart problems, liver damage.

AXIS IV: None.

At the tie of discharge, he denied thoughts of suicide and homicide. He denied auditory and visual hallucinations. Medications were discussed with him and his family and they verbalized understanding of them. They also verbalized understanding the importance of medication compliance and the importance of followup care with Dr. Burns at Singing River Mental Health Center. He is discharged home on an 1800-calorie ADA diet.

Dr. Henry A. Maggio, the Employer's medical expert, re-evaluated Claimant on December 13, 2001 and, in view of its importance herein, I shall include the entire report for ease of reference to put this matter in proper perspective (EX T):

The following is a Psychiatric Evaluation of Richard McBride, which was done in my office on 12/13/01. This is a reevaluation of Mr. McBride who was first seen and evaluated on 2-7-97, in the case of Richard McBride v. Halter Marine, OWCP No. 6-159199. Originally, Mr. Bride was to come on November 28th but he was unable to do so as he was rehospitalized again for psychiatric reasons at Brentwood Hospital from 11-27-01 through 12-10-01. He immediately called when he got home and I made arrangements for him to come on 12-13-01 and he did in fact come for his appointment accompanied by his wife and another male who turned out to be a prayer partner.

Mr. McBride was seen for evaluation on 2-7-07, and reference was made to the previous report. This is a complicated and convoluted case and my diagnostic impression of Richard McBride was on Axis I: Adjustment Disorder with Mixed Emotions of Anxiety and Depression, Resolving and the second diagnosis was Substance Induced Psychosis, Mainly Alcohol and possibly other drugs as Cocaine, In Remission; Axis II: Personality Disorder Not Otherwise Specified with Features of Paranoia, histrionic

and Avoidance Personality Traits; Axis III: No Disease Found.

Discussion was that his Adjustment Disorder with Mixed Emotions of Anxiety and Depression, Resolving, was because he couldn't get back to work but was being treated appropriately with that situation at the Mental Health Center with mild medications, is not disabled from this condition and could return to work. The second diagnosis of Psychotic Disorder due to Substance Induced Psychosis, Alcohol and possibly Cocaine, would explain the emergence of his symptomatology of paranoia. It also would explain the Organic Brain Syndrome and the Mental Retardation diagnosed by Dr. Pickel. He was currently compensated from those conditions, was not organic at that time, not psychotic and certainly not mentally retarded.

The Axis II diagnosis of Personality Disorder is an expression of features in his personality with Paranoia, Histrionic behavior, and Avoidant Personality Traits. He was not disabled from this condition, could return to work with this condition.

It was also noted he did not have evidence or complaint of a Post-Traumatic Stress Disorder at this time and his history did not reflect that he received any injury nor was there any injury that would meet the diagnosis of PTSD. He is not retarded; he is not psychotic; he is not disabled and it is felt he could benefit from continued care at the Mental Health Center, which would help his anxiety, depression, and his personality problems.

Preparation for the current reevaluation was a review of all the material from my first evaluation. In addition, I was presented with additional material consisting of a note from Dr. Longnecker dated August 20, 2001 reiterating his position that Mr. McBride did not have any disabling or serious physical problem. He was released to work doing light duty. He also was noted to have psychotic behavior, which required referral to a psychiatrist. The final diagnosis was Chronic Lumbosacral Strain with 5% total body loss with limitations to avoid heavy lifting, bending or stooping. It was felt he could do light duty work if his mental status was such that he could be retrained to engage in that type of activity. In addition, I was given office notes of Dr. Gupta, which listed visits 11-20-96, 4-2-97, 4-16-97, 7-3-97, and 7-16-97. There was also one note of 12-22-98. There was also brief discharge planning from Brentwood Hospital where Mr. McBride was admitted 11-27-01 through 12-10-01 and it listed the medications and diagnoses of Axis I: PTSD; Major Depressive Disorder with Psychotic Features. It gives a list of his medicines; 2 pages of discharge instructions from Singing River Hospital Emergency Department 12-13-01. He was seen for this evaluation 12-13-01. This

evaluation pertains to him having dizziness and high blood sugar as he now has developed diabetes. He also brought me a copy of his Baptismal Certificate, which shows he was baptized on July 15, 2001. Mr. McBride also has mailed me two letters in which there is obvious hyperreligiosity on the envelopes and on the pages (a copy of which will be attached to the report).

There's a series of questions posed to this examiner, which will be address at the end of the report.

An overview of this difficult and convoluted case reveals from the records that Mr. McBride was seen at the Jackson County Chiropractic Clinic for complaints of pain in the neck, mid-back and lower back, sprain/strain 5 times in the month of October 1990; same chiropractic clinic for dislocation of cervical spine at C5, pain in thoracic spine, dislocation of lumbar spine after moving heavy furniture at home 5 times in the month of May 1992, in the same chiropractic clinic for treatment of cervical torticollis, dislocation of thoracic vertebrae and lumbago in the month of January 1993, and again for sprain and strain thoracic and lumbar area in February of 1994.

It was the incident at work on 3-3-94, with a misunderstanding and altercation with his supervisor and no loss of work time. He subsequently had visits to the emergency room for mild sprain/strain, was treated conservatively and had visits again on 3-20-94, with acute musculoskeletal back and chest pain and continued working.

The date of the incident in question for this lawsuit was 4-13-94, when he reports that he was lifted a foot off the ground on the steel plate on the bulkheads and he went to the emergency room and was seen by Dr. Whitlock with a mild sprain or strain and treated conservatively. He did not return to work after this date.

On May 5, 1994, he went to see Dr. Longnecker, was diagnosed with Ligamentous and Muscular Pain with subsequent workup, which was negative including an MRI. He was given a return to light duty in July of 1994 and the original note that was sent to Crawford & Company in Metairie, Louisiana on June 13, 1994, states that his problems from an orthopedic standpoint were basically ligamentous and muscular in nature. He was returned to light duty in July of 1994. Dr. Longnecker wrote a prescription dated May 16, 1996, where he indicated the final diagnosis was Chronic Lumbosacral Strain with 5% total body loss with limitations to avoid heavy lifting, bending or stooping. He felt that the man could do light work if his mental status was such that he could be retrained to engage in that type of activity.

Mr. McBride continued to take medicines and to drink alcohol and was seen for an intake at Singing River Mental Health Center 11-29-94, and given a provisional diagnosis of PTSD and Alcoholism. He was treated by Dr. Dreher and Dr. Feldberg (without the benefit of a psychiatric evaluation) with antidepressants and treatment for alcohol abuse.

He was next seen 4-18-95 by Dr. L. Pickel, Ph.D., for psychological evaluation, which showed him to be intellectually impaired, academically illiterate and exaggeration (sic) of his symptoms. He had a full scale IQ of 60 and subsequently received Social Security Disability.

He continued in outpatient treatment with the Singing River Mental Health Center from November of 1994 through October of 1996, as an outpatient with infrequent visits and is being treated with antidepressant medication consisting of BuSpar and Pamelor, which seemed to control his symptomatology and complaints.

He is next seen by Allen Hearne, Ph.D., in Jackson, Mississippi on October 1, 1996, on evaluation for severe anxiety and depression and Dr. Hearne makes an initial diagnosies of Post-Traumatic Stress Disorder, Rule Out Anxiety Disorder, Rule Out Major Depression, Single Episode. A review of his records show that he saw him as an outpatient from October 1, 1996 thru November, 1996 and after his brief hospitalization continued with one visit in December of 1996. We have no records of him seeing Dr. Hearne since that time. Dr. Hearne referred him for hospitalization at Charter Hospital in Jackson where he was admitted from 11-24-96 through 11-29-96, Dr. Gupta, M.D., with a final diagnosis of Major Depressive Disorder with Psychosis, Post-Traumatic Stress Disorder. Axis II: Personality Disorder with Psychosis, Post-Traumatic Stress Disorder Not Otherwise Specified and Axis III: History of Closed Head Injury. He apparently left the hospital and was discharged AMA, had not been seen again by Dr. Gupta until a more recent hospitalization, which will be detailed later.

Evaluation that I performed on 2-7-97, gives a detailed history of the incident from 3-3-94, and 4-13-94 the diagnosis was Adjustment Disorder with Mixed Emotions, Substance Induced Psychosis and Axis II: Personality Disorder Not Otherwise Specified.

When seen today, Mr. Bride appears on time for his evaluation accompanied by his wife and another male. He comes readily into the office, was made comfortable and he immediately remembers being at the office a couple of years ago, produces some information that he wants me to have, which was listed in the first part, his Baptismal Certificate, etc. He is alert but

somewhat agitated, seems to have a push of speech. As the evaluation continues he appears obsessed with the idea of Halter ruining his life. His speech is punctuated with delusional material that is both paranoid and has a flow of hyperreligiosity to it.

I get him to calm down and I explain again why he is here to see me and he understands that he is coming for an evaluation and said he welcomed this opportunity. Since he had seen me in 1997, he said he continues to go to the Singing River Mental Health Center as an outpatient and sees Dr. Barnes monthly for medicine, which he describes at BuSpart 15 mg., three time a day and Pamelor 50 mg., 2 at bedtime, which he has taken since October 31st and these medicines have helped him. He has a case worker who apparently comes by the house once a week to check on his medicines. We have no records of this.

He also states that he's been seen by Dr. Hearne in Brookhaven twice a month since 1996 and we have no records of that. He said they meet hourly and they talk.

He states he developed more depression and was having secondary homicidal and suicidal ideation and he was admitted to Brentwood Hospital in Jackson from 11-27-01 through 12-10-01, under the treatment of Dr. Gupta. He apparently improved, denied suicidal and homicidal ideation. There was no hallucination. He verbalized a willingness to take his medicines and to follow-up with the M.D. His affect was described as bright. The diagnosis was Major Depressive Disorder, Post-Traumatic Stress Disorder. He was given a list of medications as follows:

Geodon 40 mg twice a day from 12-11-01
Trilafon 8 mg. at bedtime 12-11-01
Cogentin 0.5 mg. twice a day 12-11-01
Zoloft 100 mg. at bedtime 12-11-01
Ambien 10 mg. at bedtime 12-11-01
He also is giving him medication called Glybride 3 mg. in the morning for blood sugar. All prescribed by Dr. Gupta.

He states that he recently developed dizziness and chest pain. His eyes were bothering him and he had been diagnosed with diabetes for which he takes Glybride and went to the Singing River Hospital for an IV and was treated for his dizziness at 1:00 a.m. on 12-13-01 (the day of the evaluation). A review of their record does not show anything except he was treated for constipation with medicine consisting of Ducolax and Colace, which would be appropriate stool softeners.

Mr. McBride claims that W/C (workers' compensation) has messed his life up. They have tried to kill him; they follow

him and he was going to try to kill them. He got his rifle and his wife took him to the hospital in Jackson (a 1996 admission). He said Halter Marine tries to say he is crazy but he is not. His mother has his guns and it seems like his wife and his mother are on the other side.

He carries the rifle bullets around and he talks to them. He said they are trying to kill him. He listens to God and that's why he brought all the papers, etc., to me. He sticks with the Bible and now has a prayer partner who came with him today. He said the Lord told him to bring his Baptismal Certificate, etc., to me today, which he has done.

He goes on to state that the insurance company is following him around. He gets upset and he got a gun to shoot the men. He doesn't want to do so but he would do so.

We discussed what being a Christian means and what mental illness means. He adds quickly the need for the evaluation to try to get some closure and to begin to try to be healthy. At this point we went over the medicines from Brentwood Hospital and also from the emergency room at Singing River Hospital. These are the only medicines that he had taken.

A typical day is described by Mr. McBride by going to sleep at 4:30 a.m. and sleeping until around noon. He gets up and prays, eats a little bit, spends most of his time at home alone praying. He does go outside to talk to the dog. At home with him are his wife who works 2-3 hours in the evenings at Wendy's and 3 children, a 19 year old son who is at Jackson County Junior College, a 10 year old son in the 4th grade, and an 8 year old son in the 2nd grade, all in good health. He said his wife is depressed. He attends church at the First Church of Living God and said the pastor came and got him about a year ago. He was baptized this past summer. He had been baptized 4 times previously. He didn't get his children baptized because of all the trouble from Halter Marine. He takes the bullets with him wherever he goes and he talks to them. They tell him it's because of what Halter Marine did to him. He is fixated on what they did to him and maybe he would do that to get to them but it is not right.

In his past history he states that he was first hospitalized after he was injured at Halter Marine and denies that there was ever anything wrong with him before. He states emphatically he was fine until they did that to him. He decided to fight back. The supervisor told Richard that he was saved, so Richard wouldn't hurt a saved person (there's no mention of complaint of back and neck pain in 1990, 1992, 1993 and 1994).

He states when he went to Brentwood Hospital 2 weeks ago,

Dr. Gupta told him all of this would go away. He needed to love his wife and his children. He doesn't know why they want to kill him. Dr. Gupta explains life, gives medicine, and assures him things will work out okay. God allows things in our lives. He also learned a lot about his sugar, that it's slowly killing him and that's why he needs the medicine. He states he's been married almost 17 years to the same wife and that Dr. Gupta does things right. He gets along okay with his wife and loves her. He doesn't understand why she locked him up. He is frustrated about them following him and accusing her of being on their side.

I interpret that he is hung up on the same date 4-13-94. I talked to him about letting go of it so that he can go forward. He understands. He doesn't hate them but he is trapped there and he doesn't know what to do. I interpret he cannot go forward until he lets go of the past.

He said he prays and God said I will send you to Dr. Maggio and so here he is. He states he is so tired. He is on Social Security and his wife makes $60.00 every 2 weeks and it takes $60.00 for the food stamps. He doesn't have a lawyer and has had none in 5 years. His son does the typing so that they can file their appeals.

The mental status examination today reveals a dull-looking, somewhat alert, slightly obese, black male who is obsessed about the 4-3-94 event and this controls most of his thought patterns. He is oriented to person, place, time and situation. His speech his spontaneous and it's fixated on the 4-13-94 event. His affect is guarded and paranoid and his mood is inappropriate and matches the above. There appears to be delusional thinking with paranoia, obsessions and a large degree of hyperreligiosity. He said he went to Junior College in Shipfitting and Welding. He can read and write and he graduated from high school at Moss Point High School in 1983. His intellectual capacity showed him to be able to subtract serial 7's; repeat six digits forward and reversed; give primitive answers on similarities and dissimilarities. His recent recall is clouded by living in the past, obsessing on the 4-13-94 incident, yet he can do abstract thought processes and his judgement today is within normal limits. He again said he didn't do anything wrong. I wouldn't normally do those things but I am compelled to do it. I'm just out of it. They say I'm crazy but I'm not.

The diagnostic impression of Richard McBride is on

Axis I: Major Depressive Disorder, Recurrent, with Psychotic Ideation.
Paranoid Schizophrenia, Chronic.

Axis II: Personality Disorder Not Otherwise Specified with Features of Paranoia, Histrionic, and Avoidant Personality Traits.

Axis III: Diabetes Mellitus.

I will try to discuss the reasons for my diagnoses that were made previously on 2-7-97, which differs from the diagnoses that I am making today. My previous diagnoses:

Axis I: Adjustment Disorder with Mixed Emotions of Anxiety and Depression, Resolving.
Substance Induced Psychosis, Mainly Alcohol and possibly other drugs such as Cocaine, In Remission.

Axis II: Personality Disorder Not Otherwise Specified with Features of Paranoia, Histrionic, and Avoidant Personality Traits.

Axis III: No Disease Found.

These diagnoses were given as a result of the extensive research of all the information I had before and the mental status examination on the date of the evaluation 2-7-97. It was also based on the results of the history that he gave me and everybody else, the results of the psychological testing by Dr. Pickel and the results of the hospitalization with Dr. Gupta and Dr. Hearne, in which he left the hospital after a couple of days stay, leaving AMA, that is, against medical advice. The Adjustment Disorder with Mixed Emotions of Anxiety and Depression, Resolving, is based on the symptomatology that he complained of , mainly anxiety and depression, and he was being treated with BuSpar and Pamelor by the doctors at the Singing River Mental Health Center. It was resolving in that he no longer was severely depressed when I saw him, had no psychotic ideation, no suicidal or himicidal ideation and was totally intact with reality. He showed no Organic Brain Syndrome, showed normal intelligence. He had been recovered from the Substance Induced Psychosis, mainly caused by Alcohol and possibly Cocaine, for which he had a positive urine and for which he was terminated. Both these Axis I Diagnoses were in no way related to the incidents listed in March and April of 1994. He had a long history of anxiety and depression. He had a long history of personality structure that antedated anything at work at Halter marine characterized by paranoid features, histrionic, which means dramatic and theatrical features in which he complains out of proportion to any incident that may have happened as with his complaint of musculoskeletal pain for which no objective findings were forthcoming and for which he was discharged back to light duty. Avoidant Personality Traits

means he tries to avoid going back into a situation that he's uncomfortable with.

At the time I saw him, he was in no way disabled, psychotic, mentally retarded, and there was no psychiatric reason why he could not return to work.

Further review of the situation shows that he'd been seen at the Singing River Mental Health Center in November of 1994, with a tentative diagnosis of PTSD and Alcoholism, the latter being an accurate diagnosis for which he was treated by Dr. Dreher and Dr. Feldberg with antidepressants and alcohol withdrawal. Neither of these two psychiatrists was afforded the opportunity to perform a psychiatric evaluation.

In April of 1995, Dr. Pickel did a psychological evaluation and found him to be intellectually impaired, academically illiterate and exaggeration of symptoms with a full scale IQ of 60 for which he ultimately receives Social Security Disability.

He was seen and followed by the Singing River Mental Health Center from November of 1994 through October of 1996 and treated with antidepressants Pamelor and antianxiety agent BuSpar. There was no psychosis, no suicidal or homicidal ideation. In October of 1996, he saw Dr. Allen Hearne, Ph.D., Psychologist, and initially given a diagnosis of PTSD, Rule Out Atypical Anxiety and Major Depressive Disorder, Single Episode. in junction with this workup he was also seen by Dr. Gupta and admitted in November of 1996 to the Charter Hospital in Jackson with an Axis I Diagnosis of Major Depressive Disorder with Psychosis, PTSD; Axis II: Personality Disorder NOS. He left the hospital Against Medical Advice. The history is that since that time he had been followed by Dr. Hearne but we have no records of that and also Dr. Gupta but he didn't go back to Dr. Gupta until it was time to come see me again in November of 2001. At the time I saw this man on 2-7-97, there was no indication, no complaint, no symptomatology and no evidence that he had Post-Traumatic Stress Disorder. The diagnosis was based on subjective complaints. Again I state there was nothing that said he had PTSD.

Coming to today's diagnoses on

Axis I: Major Depressive Disorder with Psychosis and a second diagnosis of Paranoid Schizophrenia, Chronic;

Axis II: Personality Disorder No Otherwise Specified with Paranoid, Histrionic and Avoidant Personality Traits;

Axis III: This is now Diabetes Mellitus.

It is obvious that he had Major Depressive Disorder features with psychosis at various times. The first time I thought it was probably due to the alcoholism and the substance abuse. When I saw him in 1997 he did not have a Major Depressive Disorder and did not have any psychosis. His personality structure is as listed before. Now I see him and he's had another admission to Brentwood Hospital by Dr. Gupta without being seen in the intervening 5 years or treated by this man. He comes out of the hospital now with a diagnosis of Major Depressive Disorder, With Psychosis; PTSD. Now have him on major antipsychotic medication (while he was being treated by the Singing River Mental Health Center for anxiety and depression with BuSpar and Pamelor as late as 10-31-01). Now he's on major antipsychotic medication, Geodon and Trilafon. He is also on Cogentin for the side effects from these medications and also Zoloft for depression and Ambien for sleep. He has also develooped Diabetes Mellitus for which he is being treated with an oral hypoglycemic agent. He was in the hospital 10-27-01 to 11-27-01 and was supposed to see me on 12-13-01. In the wee hours of the morning at 1:30 a.m., he goes to Singing River Hospital with complaints of dizziness and he basically had findings of constipation. They give him IV's and some medicine for that and he came to see me that afternoon. As my evaluation shows, he has signs and symptoms of a Major Depressive Disorder with Psychosis, By History and By Treatment. I think the true diagnosis is Paranoid Schizophrenia, which is Chronic.

Paranoid Schizophrenia is a major psychiatric condition that has a thought disorder and a feeling disorder. As often times happen with conditions that do not manifest themselves truly clinically over a period of time, people present with different symptomatology and severity of their symptomatology and it is not uncommon for someone to be noted to have Major Depressive Disorder with Psychotic Features, Single, and then becomes a Recurrent and it is interesting that his has done so mainly when he is being evaluated for some reason. This man said he is not crazy but I think that he is psychotic. The Schizophrenia presents itself with depression, presents itself with psychotic paranoid ideation and it also presents itself with his case with hyperreligioisity.

It is to be noted that there is no connection whatsoever between his work-related incident and emergence of his Paranoid Schizophrenia over a 5 year period.

To answer the questions posed to this examiner are as follows:

1. What is his current condition?

His current condition is on

Axis I: Major Depressive Disorder with Psychosis and a second diagnosis of Paranoid Schizophrenia, Chronic;

Axis II: Personality Disorder Not Otherwise Specified with Paranoid, Histrionic and Avoidant Traits;

Axis III: This is now Diabetes Mellitus.

2. Is he disabled from this condition?

Actually he is disabled from the condition, which I am going to call Paranoid Schizophrenia, Chronic. This is a condition that is a major psychiatric illness, which is both a thought disorder and a feeling disorder. It's expressed in this man because of his obsession with the idea that something happened to him at the hands of Halter Marine since 4-13-94, and they have made his life miserable. It is expressed through the delusion of paranoia, in which people are trying to kill him, etc. It's expressed in his hyperreligiosity. Therefore, he is currently disabled from working because of this condition. However, there is hope because the medicine they currently have him on now, Geodon and Trilafon are major psychiatric antipsychotic medications.

3. Is he disabled currently, if so, is it related to the alleged work injury?

He is disabled currently. However, it is not related to the alleged work injury of 4-13-94. Schizophrenia is not caused by a work injury and this man did not have any gross physical injury. Schizophrenia is a condition that is a major thought and feeling disorder and was not caused by his work injury.

4. Could he return to work with medications?

Currently, he cannot return to work but it is hoped that with the antipsychotic medications that he is now taking, he may be able to reintegrate and possibly return to work. Many people that have schizophrenia are able to work with the medications.

5. Could his work injury have aggravated, exacerbated, or contributed to his condition, and if so, would it be permanent or temporary?

It is my belief that his work injury did not aggravate,

exacerbate or contribute to his condition. The history of schizophrenia is that it is not caused or aggravated by work conditions but rather it is a condition that is probably genetic and is a mixture of nature. The work incident did not cause his schizophrenia. The incident was in 1994 and he was manifesting anxiety and depression of longstanding duration. I saw him in 1997 and he did not have schizophrenia. It is only recently that he's had clinical manifestations of it. There is no cause and effect relationship.

6. Is his current treatment medically necessary and is it related to the reported work injury?

His current treatment is medically necessary and is appropriate for the condition he now has. His condition is not related to the reported injury of 4-13-94.

In summary, we have a man who has a very convoluted and serious psychiatric condition. He has the alleged work incident of 4-13-94 preceded by the injury of 3-3-94. He later in 1995 is found to be intellectually impaired and academically illiterate and exaggeration (sic) of symptoms with a full scale IQ of 60 for which he gets Social Security Disability. However, this was at the time folowing his alcoholism and abuse of drugs. Two years later he is diagnosed with PTSD, Atypical Anxiety and Major Depressive Disorder, Single, and subsequently Major Depressive Disorder with Psychosis and a Personality Disorder. In 1997, I see him giving a diagnosis of Adjustment Disorder with Mixed Anxiety and Depression and also a Personality Disorder. He basically oscillates back and forth and again is admitted to the hospital in December of 2001 with a diagnosis of Major Depressive Disorder with Psychosis; Personality Disorder Not Otherwise Specified and now Diabetes Mellitus. My evaluation is that he does have those but he also has the emergence of Paranoid Schizophrenia, which is Chronic. As already stated, the Personality Disorder already antedates any of this. The Major Depression with Psychosis has been intermittently found, previously not treated with antipsychotic medicine and now 3 years later is treated with antipsychotic medications. It is my belief he has Paranoid Schizophrenia, which is Chronic; it is not work-related; he is disabled; he does need the medication. But again this is not work-related, according to Dr. Maggio.

The parties deposed Dr. Longnecker on January 10, 2001 (EX V) and the doctor reiterated his essential thesis that on December 7, 1994 he had "referred (Claimant) to the Mental Health Center because he was having considerable mental health problems dealing with his illness and his inability to work, and was having severe depression. And, in fact, (the doctor) did

send him to Mental Health Center at that time." (EX V at 8)

According to Dr. Longnecker,

> From other correspondence, he developed further progressive mental deterioration, depression, and, in fact, some psychotic behavior requiring a referral to a psychiatrist. It appeared to me at the time that the patient did have severe underlying mental problems, at times exhibiting some behavioral problems, and certainly mentally, from a medical standpoint, needed to see a physician specializing in the treatment of this.
>
> I did feel that he was certainly disabled for functional employment because of his medical problems and certainly from a psychiatric standpoint it appeared to me he was, although I'm not qualified to make that comment. Again, I felt that his - - basic problem was that of chronic ligamentous muscular strain to his lower back. I indicated to counsel and to the insurance carriers that I felt as a result of this injury he did have a permanency to me as of that time of five percent of total body loss with no heavy bending, stooping, lifting. I felt he could return to the work force in light capacity if such were available, and if his educational background and such were that he was retrainable.
>
> Whether this is possible under the circumstances, again, I think I would bow to the mental health people in determining this, because Richard has had some obvious problems, that which probbly as of today have not been satisfactorily resolved. I have not seen him since then, however I'm looking at him today in this conference.

(EX V at 9-10)

With reference to Claimant's recent hospitalization, Dr. Longnecker further testified as follows (EX V at 14-17):

Q. And, Dr. Longnecker, with respect to the referral for psychiatric treatment, are you aware of what treatment he has received?

A. I think I have a couple of reports documented recently referred to me from psychiatric admission he had at Brentwood Behavioral Healthcare Center in Mississippi in Jackson, under the care of Dr. Gupta. This is dated recent, submission dates were November 2001 and December 2001.

Q. And that was something that was provided by Mr. McBride; is that correct, to you?

A. Yes, I think so.

Q. An other than that, do you have any other records regarding his treatment from a psychiatric standpoint?

A. Not available in my records, no, I do not.

Q. And, Doctor, again, I asked you earlier if you would defer to the psychiatrists who have examined or treated Mr. McBride with respect to his ability to work from a mental standpoint, and you said you would; is that correct?

A. Absolutely.

Q. Being that you also indicated your field was not psychiatry, would you also defer to the psychiatrists who have seen or examined Mr. McBride with respect to their opinions on causation and diagnosis of his mental condition, if any?

A. Absolutely, sure.

Q. And, Dr. Longnecker, another thing, you had indicated that you had made a referral to - - for mental health services as early as 1994, could you find where that referral is in you file?

A. I think it occurred in December of ‘94. 7 December ‘94, Richard has been advised to seek assistance from the Mental Health Center.

Q. And Mr. McBride handed you a prescription pad?

A. Yes, that’s correct.

Q. Is that pad - - in your practice as an orthopedic physician when you fill out a prescription like that, is that something you give to the patient, Mr. McBide?

A. It could be. I think in Richard’s case he was having considerable problems, depression and so forth, and asked me to give him this for seeking mental health therapy in Jackson County, if my memory is correct, at Singing River Hospital Systems.

Q. The reason I ask, Dr. Longnecker, is because I’ve reviewed the letters that you’ve written to Sue Silva with Crawford & Company, the letter you wrote to myself and his former counsel, Jimmy Hasler, and nowhere in any of the

correspondence to any of those parties I mentioned do you mention that he needed referral for psychiatric treatment. Do you show anywhere in your file where you wrote to the insurance company or someone with your office wrote to the insurance company or employer regarding a referral?

A. In December of '94 my office notes indicate that I think we had referred him to the Mental Health Center in Jackson County, Singing River Hospital System. And I think that's consistent with the note that I just saw.

Q. Can you find that for me, Doctor?

A. January 7th of '98 I sent him with another one. I thought is was in December when I said he needed to go there.

(DISCUSSION HELD OFF THE RECORD)?

A. Yes, it says here December 7th, 1994 where he had worked for four days and then they fired him because of a drug test, and then I referred him to the Mental Health Center, it clearly indicates, at the bottom of that. I think that's the date that the prescription was written, also.

With reference to Claimant's disability, Dr. Longnecker further testified as follows:

EXAMINATION BY RICKY McBRIDE:

Q. How much disability did you award Richard McBride?

A. I think ultimately I did say he had a permanency associated with his back, and I estimated at one time and wrote a note to the point that he had five percent permanency as a result of these injuries. He had limitations as I've outlined.

Q. Did Richard McBride request authorization for his psychological treatment?

A. Did he request it?

Q. Yes.

A. Yes, he did, as according to my notes in December of '94. And I did, in fact, refer him to the Mental Health Center in Jackson County Singing River Hospital System.

(EX V at 20)

The Employer again requests that Claimant's claim for

additional medical and compensation benefits for the following reasons (EX G):

This case is once again on remand to this Court from the Benefits Review Board inasmuch as the Board is once again attempting to substitute its opinion for this Court*s. This Court had previously concluded that the Employer had submitted sufficient evidence to rebut the presumption of causation linking Claimant*s alleged psychological condition to his employment. The Benefits Review Board, however, reversed this Court*s holding regarding causation. Then this Court held that Claimant was not entitled to any past medicals for his psychological treatment because Claimant had never requested authority. Furthermore, this Court relied on Dr. Maggio*s opinion that Claimant was not disabled from a psychological standpoint. Finally, this Court also denied Claimant*s request for modification and found the medical documents presented by the Claimant in support of his motion for modification to have already been admitted into evidence and other documents submitted by Claimant to be irrelevant or cumulative, according to the Employer.

In their most recent Decision and Order, the Board held that this Court did not address evidence in the record contradicting Dr. Maggio*s opinion regarding Claimant*s ability to perform the alternate employment provided by the employer. The Board also found that this Court erred in holding the documents submitted by the Claimant in support of his motion for modification were already part of the record, and thus, this Court must consider these documents. Finally, the Board held that this Administrative Law Judge needed to address evidence in the record that Claimant had been referred for requested authorization and for his psychological treatment.

The Employer again moves that the entire claim be denied for the following reasons (EX W):

By correspondence dated August 23, 2001, Halter Marine submitted its Brief on Remand addressing the issues raised by the Benefits Review Board in its second Decision and Order remanding this case to this Court. Since the filing of the Brief on Remand, this Court re-opened the record to allow the submission of rebuttal evidence by the Employer inasmuch as Claimant continued to file various pleadings, documents and medical reports. The Employer has now submitted a current medical report from Dr. Henry Maggio, following a re-evaluation of the Claimant on December 13, 2001, and the Employer has also submitted the deposition of Dr. Longnecker taken on January 10, 2002. This Supplemental Brief on Remand specifically addresses these two exhibits submitted by the Employer as Employer has already submitted a Brief on Remand.

DR. LONGNECKER'S DEPOSITION

Dr. Longnecker's deposition was obtained on January 10, 2002. In his deposition, Dr. Longnecker admitted that he had not seen the Claimant in five to six years (P. 13). Dr. Longnecker further acknowledged in his deposition testimony that at the time he had last seen Claimant, that regardless of any alleged psychiatric condition, he still believed Claimant could return to work in light duty and eventually to regular duty (17, 18). Dr. Longnecker also testified that he had found no significant objective findings with respect to Claimant's condition stating:

> I could not find anything objective to correlate with his subjective complaints. His tests were all normal, including an MRI study of his neck and lower back. I felt that his problem was muscular/ligamentous in nature.

(**See** deposition, EX V at p. 12). With respect to any need for psychiatric or psychological treatment, Dr. Longnecker testified that he would defer to the psychiatrist involve in this case with respect to any opinions regarding Claimant's ability to work and causation of any alleged mental problems (pp. 10, 11; 21).

With respect to the August 20, 2001, correspondence written by Dr. Longnecker "To Whom it May Concern", Dr. Longnecker admitted that at the time he wrote that report, he had not examined the Claimant in more than five years (p. 25). Furthermore, Dr. Longnecker admitted that that report was the first time he had assigned any permanent impairment, noting that prior to that time, he had never had any basis to assign an impairment (p. 25). Finally, Dr. Longnecker also testified that he wrote the report at the request of Claimant (p. 13).

Obviously, from Dr. Longnecker's deposition testimony, it is clear that he had no basis to assign a permanent impairment rating or permanent restrictions, having not examined the Claimant in more than five years and having last released Claimant to return to work with no objective findings to support any permanent disability. Regardless, however, Halter Marine had already submitted testimony that it had suitable employment available within Claimant's work restrictions assigned by Dr. Longnecker at the time of his original release of Claimant. This Court has already heard testimony from witnesses with Halter Marine that such work was available to Claimant beginning September 9, 1994 and would have been available to Claimant but for his termination for failure of a drug screen. (**See** This Court's April 17, 1997, **Decision and Order** pp. 28, 29). It is clear that from a physical standpoint, according to Dr.

Longnecker, Claimant is capable of work and was capable of work in 1994 when Halter Marine returned him to work in a light duty position, according to the Employer's essential thesis.

With respect to Dr. Longnecker's referral for treatment of his alleged psychiatric condition, it is also clear from Dr. Longnecker's deposition testimony that Claimant requested Dr. Longnecker refer him to Mental Health Services as early as December of 1994, but there is no indication in any of the correspondence written to Claimant's counsel, the adjuster or the undersigned counsel for Halter Marine that such a referral had been made or was necessary. The first and only mention of a referral for alleged psychiatric treatment was on a December, 1994, prescription pad and office note which was not provided to the Employer until after Claimant first raised the issue of an alleged psychological injury at the first continued hearing on September 23, 1996.[5]

SECOND EVALUATION BY DR. MAGGIO

Claimant was examined a second time by Dr. Henry Maggio on December 12, 2001. His report regarding that examination has also been submitted as an exhibit. As evidenced by Dr. Maggio's report, Dr. Maggio performed a very detailed repeat evaluation of Claimant reviewing his prior report and records, as well as additional records and reports generated by Drs. Longnecker and Gupta since his original evaluation.

According to Dr. Maggio's report, Dr. Maggio changed his diagnosis from his original evaluation, stating:

> The diagnostic impression of Richard McBride is on
>
> Axis I: Major Depressive Disorder, Recurrent, with Psychotic Ideation. Paranoid Schizophrenia, Chronic
>
> Axis II: Personality Disorder Not Otherwise Specified with Features of Paranoia, Histrionic, and Avoidant Personality Traits.
>
> Axis III: Diabetes Mellitus.

[5]It is noted that in response to Claimant's request, Dr. Longnecker subsequently issued one or more reports regarding a referral which were first provided to the Employer well after the hearing in this case. As raised in the Employer's Brief on Remand and as previously noted in this Court's prior Decisions, the issue of an alleged psychological injury was first raised at the September, 1996 hearing.

(**See** report, p. 7) Dr. Maggio's new diagnosis still includes no finding of Post-Traumatic Stress Disorder, similar to his original diagnosis in 1997. In fact, Dr. Maggio stated that at the time he saw Claimant on February 7, 1997 "there was no indication, no complaint, so symptomatology and no evidence that he had Post-Traumatic Stress Disorder", contrary to diagnoses of Post-Traumatic Stress Disorder made by Dr. Allen Hearne and Dr. Krishan Gupta. (**See** report, p. 8)

Of upmost importance, Dr. Maggio diagnosed Chronic Paranoid Schizophrenia which he described as a "major psychiatric condition that has a thought disorder and a feeling disorder" (p. 9) Dr. Maggio indicated that the condition is one that may not manifest itself immediately and instead a patient may present with different symptomatology and may become recurrent. Dr. Maggio further noted that "it is interesting that [Claimant's] has done so mainly when he is being evaluated for some reason" (p. 9). Finally, Dr. Maggio noted that there is "no connection whatsoever between his work-related incident and emergence of his Paranoid Schizophrenia over a five year period" (p. 9).

Finally, Dr. Maggio concluded that Claimant was disabled from the Chronic Paranoid Schizophrenia which is a major psychiatric illness. According to Dr. Maggio, Claimant was receiving appropriate medication for the condition (p. 10). Dr. Maggio went on to note that this condition, and subsequent disability, was not caused by Claimant's work injury, further noting that the Claimant's work injury "did not aggravate, exacerbate or contribute to his condition." Dr. Maggio based his opinion on the following:

> The history of schizophrenia is that it is not caused or aggravated by work conditions, but rather it is a condition that is probably genetic and is a mixture of nature. The work incident did not cause this schizophrenia. The incident was in 1994 and he was manifesting anxiety and depression of longstanding duration. I saw him in 1997 and he did not have schizophrenia. It is only recently that he has had clinical manifestations of it. There is no cause and effect relationship.

(**See** Dr. Maggio's report, p. 11)

While Dr. Maggio concluded that Claimant has a disabling psychiatric condition, it is clear from his most recent evaluation and report that the mental condition and resultant disability is unrelated to any work incident and was not aggravated by the work incident at issue in this case. Dr. Maggio's recent evaluation and subsequent report provides

further support to his original opinion that Claimant did not suffer from a work related psychiatric condition as originally found by this Court in its initial Decision and Order of April 17, 1997.

In conclusion, the Employer submits:

Based on the recent deposition of Dr. Longnecker and report of Dr. Maggio, along with the evidence and testimony previously submitted by the parties, this Court should conclude that Claimant has no work-related psychiatric condition and no disability related to any work-related psychiatric condition. This Court should further conclude from a physical standpoint, Claimant could have returned to work following his minor physical injury and that Halter Marine provided suitable employment within Claimant's work limitations. Claimant should be found entitled to no additional compensation beyond the date he was returned to work and suitable employment inasmuch as his subsequent termination resulted from a violation of company rules. Claimant should be found entitled to no additional medical treatment for his non-work related psychiatric condition.[6]

The issues herein as a result of the third remand by the Board are as follows:

I. WHETHER THE CLAIMANT HAS THE ABILITY, FROM A MENTAL OR PSYCHOLOGICAL STANDPOINT TO PERFORM SUCCESSFULLY THE REQUIREMENTS OF THE ALTERNATIVE EMPLOYMENT PROVIDED BY HALTER MARINE.

II. WHETHER THIS COURT ERRED IN HOLDING THAT EMPLOYER WAS NOT LIABLE TO CLAIMANT FOR PAST MEDICAL TREATMENT.

III. WHETHER THIS COURT ERRED IN CONCLUDING THAT CLAIMANT'S NEWLY SUBMITTED EVIDENCE IS INSUFFICIENT TO SHOW A CHANGE IN CONDITION OR A MISTAKE OF FACT.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, except as noted below, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in

[6]I agree completely with the Employer but I am constrained to issue this decision in view of the "Law of the Case" doctrine, as discussed above.

this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS

56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

As noted, to establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal**

Corp., 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by “substantial evidence to the contrary” offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not “play a significant role” in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee’s condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant’s pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant’s employment while

the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

The probative testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999), **cert. denied**, 120 S.Ct. 40 (1999).

I am aware of the most significant opinion of the U.S. Court of Appeals for the Fifth Circuit wherein that Court takes issue with and categorically rejects the Board's requirement that the Claimant must prevail **unless** the Employer provides specific and comprehensive medical evidence in the form of an unequivocal medical opinion **totally ruling out any connection** between the alleged bodily harm and the maritime employment. In this regard, **see Conoco, Inc. v. Director, OWCP (Prewitt)** 194 F.3d

684, 33 BRBS 187 (CRT) (5th Cir. 1999), and the import of this case has already been discussed above.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusziewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the

employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

As already noted above several times, I have already found and concluded that Claimant's relatively minor incidents occurring on March 3, 1994 and April 13, 1994, respectively, constitute work-related injuries. As also noted above, the Board, notwithstanding my judgment, concluded that Claimant's psychological problems, as a matter of law, also constituted a work-related injury[7], and the issues on this third remand have already been delineated above.

Employer correctly points out it goes without saying that the Decision of the Administrative Law Judge must be affirmed if it is rational, supported by substantial evidence and in accordance with the law. 33 U.S.C. § 921 (b)(3); **O*Keefe v. Smith Associates**, 380 U.S. 359 (1965); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3rd. Cir. 1976). It has been held that the Board cannot re-weigh evidence, unlike the Administrative Review Board in its **de novo** review of this Judge's decision, but may only inquire into the existence of evidence to support the findings. If the evidence exists, the Decision and Order should be affirmed. **South Chicago Coal & Dock Co. v. Bassett**, 104 F.2d 522, 528 (7th Cir. 1939), **aff'd.** 309 U.S. 251 (1940); **Hislop v. Marine Terminals Corp.**, 14 BRBS 927(1982). The Board must accept the findings of the Administrative Law Judge whenever they are not "inherently incredible or patently unreasonable". **Cordero v. AAA Machine Shop**, 580 F.2d 1331 (9th Cir. 1989). It is immaterial that the facts permit the drawing of different inferences or even that the Board would reach a different conclusion on the same facts. **Cardillo v. Liberty Mutual Insurance Go.**, 330 U.S. 469(1942).

I. **WHETHER THE CLAIMANT HAS THE ABILITY, FROM A MENTAL OR**

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[7]I note that the Board used an incorrect legal standard in requiring that Dr. Maggio **must make that unequivocal statement** in ruling out any and all connection between the alleged bodily harm and the maritime employment. That incorrect standard has been rejected by at least four Circuit Courts, including the Fifth, in whose jurisdiction this claim arises. **See** footnote 1.

PSYCHOLOGICAL STANDPOINT, TO PERFORM SUCCESSFULLY THE REQUIREMENTS OF THE ALTERNATE EMPLOYMENT PROVIDED BY HALTER MARINE.

Employer submits that this Court did not err in according Dr. Maggio*s opinion more weight than those of Drs. Gupta and Hearne even though Claimant was hospitalized by Dr. Hearne, five days after Dr. Maggio met with Claimant.

It has long been held that an Administrative Law Judge is not bound to accept an opinion or theory of any particular medical examiner. **See Banks V. Chicago Grain Trimmers Assn.. Inc.**, 390 U.S. 954 (1968). Furthermore, an Administrative Law Judge is entitled to weigh the evidence and draw his own inferences from it. **See Todd Shipyards Corp. v. Donovan**, 300 F.2d 741 (5th Cir. 1962). It is also well established that the Administrative Law Judge has sole discretion to accept or reject all or any part of the testimony according to his judgment. **Calbeck v. Strachan Shipping Go.**, 306 F.2d 692 (5th Cir. 1962), **cert. denied** 372 U.S. 954 (1963).

The Fifth Circuit has affirmed the premise that an Administrative Law Judge is entitled to accept or reject any part of an expert's[8] testimony when the testimony of medical experts is at issue. **See Mendoza v. Marine Personnel Co.. Inc.**, 46 F.3d 498 (5th Cir. 1995) (**citing Avondale Shipyards. Inc. v. Kennel**, 914 F.2d 88 (5th Cir. 1990)). In **Kennel**, the Fifth Circuit held that an Administrative Law Judge is not bound to rule in favor of one party simply because that party has more numerous or more highly trained experts and, instead, the Administrative Law Judge as the fact-finder is entitled to consider all credibility inferences. **Kennel**, 914 F.2d at 91.

Employer further submits that the only credible medical evidence in this case indicates that Claimant is not disabled from his psychological condition and does not suffer from post-traumatic stress disorder. Further, the treatment by Drs. Hearne and Gupta is neither reasonable nor necessary, as there is no cause for Claimant to have traveled four hours from his home to receive treatment for a condition which he does not have. Dr. Maggio concluded that Claimant*s alleged psychological condition was being treated appropriately at the Mental Health Center with "mild medication," further indicating that the treatments offered by Drs. Hearne and Gupta were totally unnecessary. Here, this Court made credibility determinations and specifically

[8]Drs. Hearne and Gupta diagnosed post-traumatic stress disorder, a condition that was ruled out by Dr. Maggio, the only credible medical opinion in this case, according to the Employer.

rejected the opinions of Drs. Gupta and Hearne, according to the Employer.

The only credible evidence from a medical standpoint regarding Claimant*s alleged psychological condition is the opinion of Dr. Maggio. Regardless of the Board*s determination on appeal that Claimant has proven a causal connection between his psychological condition (aided by the presumption) and his alleged work injuries, the fact remains that Dr. Maggio*s opinions are the only credible opinions in this case, and he ruled out post-traumatic stress disorder and any disability associated with Claimant*s alleged psychological condition, according to Employer's essential thesis.

In this Court*s original Decision and Order, the opinions of Drs. Gupta and Hearne were specifically rejected and very precise reasons for the rejection were stated. Specifically, at page 25 of this Court's April 17, 1997 **Decision and Order**, this Court stated:

> I cannot accept those opinions (of Drs. Gupta and Hearne for the following reasons:
>
> (1) They are based primarily on Claimant*s subjective complaints;
>
> (2) They are based on incomplete and exaggerated history reports;
>
> (3) Claimant did not seek such psychological evaluation until slightly over two years after his termination by the Employer for use of an illicit drug, although as the recipient of Social Security disability benefits, he certainly had access to appropriate psychological and/or psychiatric treatment through a medical provider authorized (and paid) by the Social Security Administration;
>
> (4) Dr. Gupta and Dr. Hearne did not have the benefit of a review of Claimant*s complete medical records, especially those of Dr. Longnecker, the treating orthopedist.

(Original **Decision and Order**, p. 25)

The Employer submitted the medical evaluation of Dr. Henry Maggio, a psychiatrist in Gulfport, Mississippi, and the Court considered that and presented specific reasons why Dr. Maggio*s opinion was accepted over that of Drs. Gupta and Hearne. Specifically, this Court stated:

> On the other hand, I have accepted the well reasoned and well documented opinions of Dr. Maggio as I find his opinions to be most probative and persuasive for the following reasons:
>
> (1) Dr. Maggio had the benefit of a complete, social and employment history relating to Claimant;
>
> (2) The doctor was afforded the opportunity to review all of Claimant*s medical records;
>
> (3) The doctor performed a thorough, three hour psychiatric evaluation and performed the appropriate testing; and
>
> (4) The doctor recognized, as I did, that Claimant was exaggerating his symptoms, as well as exactly what happened on March 3, 1994 and April 13, 1994.

(Original **Decision and Order**, p. 25)

Employer submits that this Administrative Law Judge, as the trier of fact, also weighed the credibility of the witnesses, including the Claimant, and Claimant*s inconsistencies and incredible testimony support the Court*s conclusions that the opinions of Drs. Hearne and Gupta should be rejected. First, the record is replete with instances of Claimant*s exaggerations which the Board continues to ignore!! A review of each medical history obtained by the various physicians involved in this case shows not one consistent report of the incidents involved. Specifically, as evidenced by the deposition testimony of Drs. Gupta and Hearne, both doctors were intentionally led to believe that the alleged incidents involved in this claim were much more serious than the testimony and evidence reveal. For example, regarding the second alleged incident, Claimant advised Dr. Gupta that he was suspended in the air 25 feet above ground. This allegation was proven totally false by the testimony of Claimant himself at trial, along with testimony of other witnesses. This Court specifically noted that Dr. Gupta "received highly exaggerated reports of the March 3, 1994 and April 13, 1994 incidents" at page 14 of his Decision and Order.

Claimant alleges in his Petition for Review, as he did at trial, that the drug screen was "fixed in order to have him terminated," yet on the other hand, he admitted at trial that he was a drug user and after making such admission, he alleged that same was the result of his work injury.[9] Again, while admitting at trial that he used cocaine, Claimant had never told Dr.

[9]Which is specifically denied by the Employer.

Hearne or Dr. Gupta of his illicit drug use until they were advised in deposition regarding same.

Employer also points out that this Administrative Law Judge also noted that neither Drs. Gupta nor Hearne, nor the staff of either Doctor, requested authorization from Halter Marine for their treatment of Claimant. This Court also found it significant that Drs. Hearne and Gupta did not have the benefit of all of Claimant's medical reports, including the reports of Dr. Longnecker for treatment of Claimant's alleged physical ailments. These were not the only records they did not have, and instead, the absence of records that were made available to Drs. Hearne and Gupta went much further. In fact, at page 15 of the **Decision and Order**, this Court noted that Dr. Gupta was "not aware of the results of the MMPI administered by Dr. Hearne or whether Dr. Manning had administered such tests." The tests (the MMPI) administered by Dr. Hearne, even suggested Claimant was exaggerating, and Dr. Hearne admitted it was "of borderline validity" (**See Decision and Order**, p. 15). Dr. Gupta, to whom Claimant was referred by Dr. Hearne, did not even have the benefit of a very important test or its significant findings, the results of which Dr. Hearne apparently just discounted. **Id.** (**See Decision and Order**, p. 15.)

The Employer also submits that the fact that Drs. Hearne and Gupta did not have the medical records of Dr. Longnecker or any other physician is of further significance. Had Drs. Gupta and Hearne had those medical records, they would have noted the totally inconsistent history of alleged injury given by Claimant as reflected in Dr. Longnecker's and Dr. Whitlow's reports, compared to the history obtained by them. In fact, both physicians were under the impression that Claimant had suffered some head trauma, with Dr. Hearne recording a history that Claimant had been beaten in the head by his supervisor with a blunt object, an allegation that was shown completely false and was not borne out by the medical records or testimony.

On the other hand, Dr. Maggio*s report contained a precise statement of the medical records reviewed by him, which included all medical records available in this case, even those of Dr. Gupta and Dr. Hearne. Dr. Maggio performed a thorough evaluation and issued an even more thorough report that was noted to be well reasoned by this Court. A review of Dr. Maggio*s report indicates that Claimant*s complaints of his alleged injuries were very exaggerated, and Claimant even denied to Dr. Maggio that he had a drug problem[10], according to the Employer.

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[10]Even the physician who examined Claimant for Social Security purposes suspected that Claimant had a drug abuse problem. Again, this is contradictory to Claimant*s allegations

Thus, this Court previously addressed the credibility of Dr. Maggio and listed more than substantial evidence in support of its finding. This Court's finding should stand, according to the Employer's counsel who also points out that there was no claim of a psychological injury until two years after the work-related injury and after his dismissal for cause by the Employer.

The record is clear: the first allegation of any psychological condition was on September 23, 1996 at the first administrative hearing on this matter. Claimant*s counsel acknowledged that there had been no prior mention of a psychological problem, as recognized by this Court. (TR 17) At the time of the first hearing, Attorney Hays had just recently been brought into the case. With Attorney Hays* involvement came a whirlwind of activity, with Claimant engaging in blatant so-called "doctor shopping" and seeking psychological and mental treatment from physicians with whom he had never before treated. This Court also extended the discovery deadline to allow the Claimant and Employer to develop this point. On the second hearing in this matter, after the extended deadline for discovery had elapsed, Claimant had still not complied with discovery in regards to this matter. At this hearing, Employer once again informed this Court that they had not received any medical from Claimant regarding the psychological matters. (TR 34)

As evidenced by the attachments (the memorandum of informal conference, the pre-hearing statement of Claimant and the 8(i) Settlement Petition), Claimant had never before raised his alleged psychological condition as an issue in this case. By the time this case was originally set for hearing, Claimant was on his third lawyer (as evidenced by the attachment, he was originally represented by Jimmy Hasser, John Grout and Curtis Hays) and only attorney Hays chose to raise the issue of a psychological condition at the time of hearing. As such, this Court was absolutely correct that claimant raised no claim for a psychological injury until two years after the work related injury, according to the Employer.

Despite this Court's conclusion, in its Decision, the Board pointed out a prescription for Ativan written by Dr. Longnecker in June of 1994 as indicative of notice to Halter Marine regarding Claimant's psychological problems. In their obvious effort to direct this Court's decision-making and fact-finding, the Board fails to note the prescription is just that, a

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that he has no drug problem, and contradictory to his contention in his Petition for Review that if he has a drug problem, it is related to his employment.

prescription with no diagnosis or statement regarding causation, or the etiology thereof or the nature and extent thereof. The mere fact that Claimant was prescribed anti-anxiety medication cannot justify two leaps of faith: (1) that the Employer was made aware of this prescription and its purpose and (2) that the Employer was aware or should have been aware of the work-relatedness of this prescription. Is the Board suggesting that an employer has the burden of checking the **Physicians Desk Reference** (PDR) for every single medication prescribed by a physician to determine what condition that medication may be prescribed for and to then either authorize or controvert a prescription despite the fact that Claimant did not seek authorization for the medical condition? Placing such a burden on an employer is ridiculous and the Board, like the Claimant, is grasping at straws, according to the Employer's spirited defense of this claim.

Further, the first medical records from Signing River Mental Health Services are dated November 29, 1994. There is nothing in the record that indicates that Claimant was treated regularly at Singing River Mental Health and nothing to suggest the treatment was for a work-related condition. On the contrary, Claimant was told to follow up at Singing River Mental Health only after suffering "Ativan withdrawals". Therefore, Claimant was not seen at Singing River Mental Health for a psychological disorder but rather for withdrawals from the medication prescribed by Dr. Longnecker. Furthermore, although Claimant may have sought treatment in November of 1994 at Singing River Mental Health Center there is no indication that Employer was aware of that fact or even that anyone including the Claimant was aware of the alleged work-relatedness of his alleged psychological problems. On the contrary, the informal conference was held on November 8, 1994 and there was no mention of a psychological disorder or any need for anxiety medication, according to the Employer.

Finally, Claimant reached maximum medical improvement for his physical injury and the only injury of which Halter Marine was aware, no later than November, 1994. Dr. Longnecker*s referral to a psychiatrist is dated December 7, 1994. This referral was five (5) months after Claimant was released to return to work and almost three (3) months after Claimant returned to work and was terminated. This referral was after Claimant reached maximum medical improvement and after Claimant suffered from Ativan withdrawals. Furthermore, there is no indication that Claimant even utilized this referral.

Claimant may have received psychological treatment prior to mentioning his psychological problems at the hearing on September 26,1996; however, the Employer cannot be held responsible for what it did not know and the informal conference

also clearly indicates that the Claimant did not inform anyone of any psychological condition. This Court did not err in holding that Claimant*s psychological complaints arose two years after the incident because that is when they were first made apparent to the Employer and this Court as an alleged work-related injury.

As the Board has already held, under an incorrect legal standard to be reviewed eventually by the U.S. Court of Appeals for the Fifth Circuit, that Claimant's psychological problems constitute, as a matter of law, a work-related injury, that conclusion constitutes the "Law of the Case" and is binding upon the parties at least until such time as my April 17, 1997 original decision is reviewed under the substantial evidence standard by the Fifth Circuit.

Thus, as the Claimant's psychological problems constitute a work-related injury and as the Board has held, at least implicitly, that Claimant gave timely notice thereof to the Employer and as the Board has remanded this claim to determine whether Claimant is unable to return to work at any job from a psychological standpoint, such issue shall now be resolved.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently

tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

To put this issue in proper perspective, I shall again quote the specific language of the Board in its January 10, 2001 Decision beginning on page 4:

"We first address claimant's challenge to the administrative law judge's denial of disability benefit for claimant's psychological condition in the Decision and Order on Remand. As it is undisputed that claimant cannot perform his usual work due to his work injury, the burden shifted to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. **See Darby v. Ingalls Shipbuilding, Inc.**, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996); **Mijangos v. Avondale Shipyards**, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991); **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031, 14 BRBS 156 (CRT) (5th Cir. 1981). Employer may meet its burden of showing suitable alternate employment by offering claimant a job which he can perform within its own facility. **See Darby**, 99 F.3d at 688, 30 BRBS at 94 (CRT); **Darden v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 224 (1986). The Board has held that where claimant has been discharged from a light duty job within employer's own facility for violation of a company rule, and not for reasons related to his disability, employer may use that position to satisfy its burden of showing suitable alternate employment if it has established that claimant is, in fact, capable of performing the duties of that position. Thus, if employer has demonstrated that claimant is able to perform the job within its facility, the fact that the position is no longer available to claimant, due to his discharge for reasons unrelated to his disability, does not impose upon employer the additional requirement to show different suitable alternate employment outside its facility. **See Brooks v. Newport News Shipbuilding & Dry Dock Co.**, 26 BRBS 1 (1992), **aff'd sub nom. Brooks v. Director, OWCP**, 2 F.3d 64, 27 BRBS 1000 (CRT) (4th Cir. 1993); **see also Manship v. Norfolk & Western Ry. Co.**, 30 BRBS 175 (1996). Regarding this issue, the physical ability to perform

a job is not the exclusive determinant whether the identified position constitutes suitable alternate employment; rather, the administrative law judge must consider whether claimant has the ability, from a mental or psychological standpoint, to successfully perform the requirements of the position. **See Ledet v. Phillips Petroleum Co.**, 163 F.3d 901, 32 BRBS 212 (CRT) (5th Cir. 1999); **Armfield v. Shell Offshore, Inc.**, 30 BRBS 122 (1996).

"Thus, in the case at bar, the relevant inquiry in determining whether the modified duty position in employer's facility satisfies employer's burden of establishing the availability of suitable alternate employment is whether claimant's work-related psychological problems prevent him from performing the duties of that job. **See Armfield**, 30 BRBS at 123. The administrative law judge determined, in this regard, that claimant's psychological condition does not preclude his performance of the job in employer's facility.[11] In reaching this conclusion, the administrative law judge credited the opinion of Dr. Maggio, a psychiatrist who reviewed claimant's medical records and, on February 7, 1997, conducted a psychiatric examination of claimant on behalf of employer.[12] The administrative law judge found the opinions of claimant's treating psychiatrist Dr. Gupta and treating psychologist Dr. Hearne that claimant is totally disabled by his psychological condition were outweighed by the contrary opinion of Dr. Maggio and by the administrative law judge's observation of claimant's demeanor. In giving determinative weight to Dr. Maggio's

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[11]The holding in **Marino v. Navy Exchange**, 20 BRBS 166 (1988), cited by the administrative law judge in support of his decision to deny claimant the disability award sought, is inapposite to the issue of disability presented in the instant case. In **Marino**, the Board held that a psychological injury arising wholly from a legitimate personnel action is not compensable. In the instant case, the work-related incidents giving rise to the psychological injury were the March 1994 assault and April 1994 crane incident, not the claimant's discharge in September 1994.

[12]Dr. Maggio diagnosed claimant, first, with an adjustment disorder with mixed emotions of anxiety and depression, resolving, and indicated that claimant could return to work while taking the medications prescribed for that condition. Dr. Maggio also diagnosed substance-induced psychosis in remission, and personality disorder not otherwise specified with features of paranoia, histrionic and avoidant personality disorders, and stated that these conditions do not prevent claimant's return to work. EX 1.

opinion that claimant's psychological disorders to not prevent him from working for employer, the administrative law judge found it noteworthy both that claimant's psychological condition did not arise until two years after he had stopped working and that this condition is due solely to personal factors. **See Decision and Order on Remand** at 23-24. The administrative law judge's finding, that claimant's psychological condition did not arise until two years after he stopped working, is not supported by substantial evidence. Contrary to the administrative law judge's finding, the record reflects that Dr. Longnecker prescribed the antianxiety medication Ativan to claimant as early as June 1994. **See** EX 9. A few days after claimant's supply of Ativan ran out, he sought treatment on November 11, 1994, at Singing River Hospital Emergency Department, where he was diagnosed with acute anxiety, probably secondary to Ativan withdrawal, and was referred for follow-up treatment at Singing River Mental Health Center. **See** ALJ EX 12, 49. On November 29, 1994, claimant initiated treatment with Singing River Mental Health Center; he was initially seen for therapy and subsequently was also seen by Dr. Feldberg, a Mental Health Center psychiatrist, for the psychopharmacological management of his diagnosed post-traumatic stress disorder.[13] **See** ALJ EX 49. In addition, the record contains a referral for mental health treatment from claimant's orthopedist, Dr. Longnecker, dated December 7, 1994, as well as a follow-up note dated January 7, 1998 from Dr. Longnecker stating that, after first being seen on May 5, 1994, claimant progressively developed depression and psychotic behavior requiring referral to a psychiatrist. **See** CX 9; ALJ EX 12. Thus, as the administrative law judge erred in relying, in part, on this finding to support his ultimate conclusion that claimant's psychological condition is not disabling. **See generally James J. Flanagan Stevedores, Inc. v. Gallagher**, 219 F.3d 426, 430, 34 BRBS 3, 37 (CRT) (5th Cir. 2000).

"Furthermore, in electing to give determinative weight to Dr. Maggio's opinion that claimant is not disabled, the administrative law judge failed, on remand, to address evidence in the record which contradicts Dr. Maggio's opinion regarding claimant's ability to return to work. Specifically, the record

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[13]Claimant additionally underwent a psychological evaluation by Dr. Pickel as part of a Social Security disability determination. On the basis of his examination of claimant on March 21, 1995, a psychological testing conducted on March 21, 1995 and April 18, 1995, and review of Singing River Mental Health Center records reflecting claimant's continuing treatment there, Dr. Pickel made a provisional disagnosis of major depression with possible psychotic symptoms, to be comfirmed by Dr. Feldberg. ALJ EX 49.

reveals that on February 12, 1997, five days after Dr. Maggio's examination of claimant, Dr. Gupta admitted claimant to Charter Hospital, as claimant was experiencing psychotic symptoms including auditory and visual hallucinations and paranoia. During this hospitalization, claimant was treated for post-traumatic stress disorder and major depressive disorder, and was prescribed antipsychotic medications in addition to the antidepressant and antianxiety medications that already had been prescribed. On March 1, 1997, claimant was discharged from the hospital for outpatient mental health treatment, but he was not released to return to work. **See** CX 6.

"We therefore vacate the administrative law judge's determination, in his **Decision and Order on Remand**, that claimant's psychological condition is not disabling, and remand the case for consideration of all of the evidence of record regarding whether employer met its burden of establishing that claimant, in light of his work-related psychological condition is capable of performing the restricted duty position in employer's facility. **See generally Ledet**, 163 F.3d at 90, 32 BRBS at 214-215(CRT)."

Moreover, the Board also held, as a matter of law, that Claimant had submitted sufficient evidence in support of his **Motion For Modification**, that the motion must be considered, that the record should be reopened and that the parties should be given the opportunity to submit additional evidence in support of their respective positions. I have done so and the parties were given until February 15, 2002 to fully perfect this record.

This Administrative Law Judge, having again reconsidered this closed record in light of the Board's directions, now finds and concludes that Claimant is totally disabled by his psychological problems that have been variously diagnosed as follows: "an adjustment disorder with mixed emotions of anxiety and depression, resolving," as well as a "substance-induced psychosis in remission and personality disorder not otherwise specified with features of paranoia, histrionic and avoidant personality disorders" (Dr. Maggio, EX 1); "psychotic symptoms including auditory and visual hallucinations and paranoia," as well as "post-traumatic stress disorder and major depressive disorder" (Dr. Gupta, CX 6); "major depression with possible psychotic symptoms" (Dr. Pickel, ALJ EX 49); "major depressive disorder" (Dr. Hearne, CX S).

The medical evidence has already been thoroughly reviewed by this Administrative Law Judge and, prompted again by the Board, I initially point out that only Mr. Maggio opines that Claimant is able to return to work and perform the duties of the alternate job offered him by the Employer.

As already noted, Claimant cannot return to work at the Employer's shipyard because he "flunked" several drug tests and because the Department of Defense revoked his security clearance.

Dr. M.F. Longnecker, Claimant's treating physician since at least May 5, 1994, issued the following report on August 20, 2001 (CX J):

"RE: Richard McBride

"To Whom It May Concern:

"The following information is submitted on Richard McBride. Enclosed you will find my original note on 13 June 1994 to Crawford & Co. in Metairie, LA. His problems from an orthopedic standpoint were basically ligamentous muscular in nature. He had however developed severe mental health problems and was referred to the mental health center in December of 1994. I also in January of 1998 indicated he had progressively developed mental depression and psychotic behavior requiring referral to a psychiatrist. Patient has not been seen since that time. It appears to me at this point that the patient has had psychiatric problems, mental depression, and at times psychotic behavior which required referral to a psychiatrist. Further follow up I'm sure can be obtained from the psychiatrist that has been treating him. Should this be the case, then I would feel from a psychiatric standpoint and I am sure that this will be confirmed by this treating psychiatrist that he is not capable for gainful employment. You will note that there is a prescription dated May 16, 1996 where I indicated final diagnosis was chronic lumbar sacro strain with 5% total body loss with limitations to avoid heavy lifting, bending, or stooping. I felt that he could do light work if his mental status was such that he could be re-trained to engage in that type activity."

Accordingly, in view of the foregoing, and keeping in mind that Dr. Maggio examined Claimant on February 12, 1997 and that five (5) days later, Dr. Gupta admitted Claimant to Charter Hospital as Claimant was experiencing psychotic symptoms including auditory and visual hallucinations and paranoia, and during this hospitalization, Claimant was treated for post-traumatic stress disorder and major depressive disorder, and was prescribed anti-psychotic medications in addition to the antidepressant and antianxiety medications that already had been prescribed, I now find and conclude that on March 1, 1997 Claimant was discharged from the hospital for outpatient mental health treatment, **but he was not released to return to work**. **See** CX 6.

The record also reveals that Dr. Gupta had previously hospitalized Claimant at Charter Hospital on November 24, 1996. Claimant was treated at that facility for major depressive disorder with psychosis, post-traumatic stress disorder and personality disorder, and was prescribed anti-psychotic medications. Claimant was still delusional and experiencing hallucinations when he left the hospital against medical advice on November 29, 1996. In this regard, **see** ALJ EXs 50A, 54, 57; CX 2.

Thus, as Dr. Maggio's opinion on Claimant's ability to return to work pre-dates that of Dr. Gupta's hospitalization of the Claimant, and his diagnoses of Claimant's problems, I now give lesser weight to the opinions of Dr. Maggio as that time sequence "diminishes the probative value of Dr. Maggio's opinion that Claimant is able to work."

Evidence submitted post-remand essentially confirms prior evidence in the record, namely that Claimant's doctors opine that he is totally disabled by his psychological and orthopedic problems, while Dr. Maggio opines that this Claimant is totally disabled by his psychological condition, a condition that he finds to be not work-related.

Thus, as Claimant's treating physicians have opined that he cannot return to work at any job at that present time and as I may give greater weight to the opinions of the treating physicians, as opposed to a doctor conducting an evaluation solely for litigation purposes, **see Pietrunti, supra**, and **Amos, supra**, I now find and conclude that Claimant is totally disabled from all gainful employment at the present time.

Claimant's injury has not become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser**

Guiberson Pumping, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement.

Lozada v. General Dynamics Corp., 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem**., 617 F.2d 292 (5th Cir. 1982).

With reference to Claimant's residual work capacity, once Claimant establishes that he is unable to do his usual work, he has established a **prima facie** case of total disability and the burden shifts to Employer to establish the availability of suitable alternate employment which Claimant is capable of performing. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031, 1032, 14 BRBS 156, 165 (CRT) (5th Cir. 1981). In order to meet this burden, Employer must show the availability of job opportunities within the geographical area in which he was injured or in which claimant resides, which he can perform given his age, education, work experience and physical restrictions, and for which he can compete and reasonably secure. **Turner**, **supra**; **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 667, 671, 18 BRBS 79, 83 (CRT)(5th Cir. 1986); **Mijangos v. Avondale Shipyard, Inc.**, 19 BRBS 165 (1986). A job provided by Employer may constitute evidence of suitable alternate employment if the tasks performed are necessary to employer, **Peele v. Newport News Shipbuilding & Dry Dock**, 18 BRBS 224, 226 (1987), and if the job is available to claimant. **Wilson v. Dravo Corp.**, 22 BRBS 463, 465 (1989); **Beaulah v. Avis**

Rent-A-Car, 19 BRBS 131, 133 (1986). Moreover, Employer is not actually required to place Claimant in alternate employment, and the fact that Employer does not identify suitable alternate employment until the day of the hearing does not preclude a finding that Employer has met its burden. **Turney v. Bethlehem Steel Corp.**, 17 BRBS 232, 236-237 n.7 (1985). Nonetheless, the Administrative Law Judge may reasonably conclude that an offer of a position within Employer's control on the day of the hearing is not **bona fide**. **Diamond M Drilling Co. v. Marshall**, 577 F.2d 1003, 1007-9 n.5, 8 BRBS 658, 661 n.5 (5th Cir. 1979); **Jameson v. Marine Terminals**, 10 BRBS 194, 203 (1979).

Sections 8(a) and (b) and Total Disability

In this proceeding, the Claimant has sought, both before the District Director and before this Court, benefits for temporary total disability from April 14, 1994 to date and continuing. Moreover, the issue of permanency has not yet been considered by the Deputy Commissioner. (ALJ EX 2) **In this regard, see Seals v. Ingalls Shipbuilding, Division of Litton Systems, Inc.**, 8 BRBS 182 (1978).

II. **WHETHER THIS COURT ERRED IN HOLDING THAT EMPLOYER WAS NOT LIABLE TO CLAIMANT FOR PAST MEDICAL TREATMENT.**

In its **Decision and Order** the Board indicated that this Court did not address the evidence in the record that Claimant did request authorization for psychological treatment. Halter Marine maintains that there is no credible evidence in the record that Claimant requested such authority.

Section 7(d) of the Longshore Act provides that an employee must request authorization from the employer before obtaining medical treatment. Specifically, Section 7(d) states:

> An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless he shall have requested the employer to furnish such treatment or services, or to authorize provision of medical or surgical services by the physician selected by the employee, and the employer shall have refused or neglected to do so, or unless the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize the same...

33 U.S.C. §907(d)

Employer's counsel submits that the employee is required to request authorization for treatment, even if he is unaware of the work-relatedness of his illness. **Mattox v. Sun Shipbuilding & Dry Dock Co.**, 15 BRBS 162 (1982). The employer is not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization. **Slattery Assoc. v. Lloyd**, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT) (D.C. Cir. 1984); **Swain v. Bath Iron Works Corp.**, 14 BRBS 657, 664 (1982). Mere knowledge of medical treatment by an employer or carrier does not create an obligation to pay for it, Claimant must first request treatment and obtain written authorization before a medical expense is compensable under Section 7(d) and 20 C.F.R. §§ 702.405 and 702.406.

Employer further submits that, in the instant case, Claimant not only failed to request authorization for his alleged psychological treatment but he did not even inform Halter Marine of a psychological claim. The first mention of any psychological injury was made to Halter Marine's attorney at the first administrative hearing of this matter on September 23, 1996.

The Board pointed to Claimant's testimony wherein he stated that he requested payment for certain medicals and was denied. First, Halter Marine must point out that this Court witnessed the Claimant and his incredulous and incredible testimony. Is it any surprise that he would make such an allegation that is totally inconsistent with the representations made by his own lawyer to this Court? The record is replete with instances of Claimant's exaggerations and inconsistencies. Not only were Claimant's complaints of his injury highly exaggerated and inconsistent, but even his testimony and allegations regarding drug use and his termination for violating the drug policy were inconsistent. Thus, at best, Claimant's credibility has been called in to question and therefore any testimony by the Claimant with respect to this issue is not entitled to be accorded much weight, according to the Employer.

Second, Claimant's testimony states he requested that Halter Marine pay for his "medication." (TR 134-135) Furthermore, Claimant indicated that "my wife called the company and asked them to pay the <u>bill</u> and pay <u>medical bills</u> too." (ET pg. 180) (emphasis added). Claimant's testimony does <u>not</u> state that he requested authorization to <u>see a psychiatrist</u> or pay for <u>psychotronic</u> medication. Claimant's testimony, however much weight it can be afforded, does not state that he ever requested authority to see anyone regarding a psychological condition only that he requested payment for bills already incurred, according to Employer.

Claimant did testify that Dr. Longnecker referred him to

Singing River Mental Health. (FE. pp. 130, 131, 180) However, Dr. Longnecker's referral specifically states "Richard has been advised to seek prescription at the Mental Health Center." Furthermore, as previously stated, Dr. Longnecker did not "refer" Claimant, if you can call it a referral, until after he had reached maximum medical improvement. Finally, there had not been any indication or notice of a psychological claim to Halter Marine at that time. The first mention of any psychological injury was in September 1996 at the first hearing of this matter, according to Employer.

In regards to Drs. Hearne and Gupta, Claimant admitted that he did not seek authorization. (TF. p. 181) Even if this Court could conclude that Claimant sought authorization and was denied same by Halter Marine, thereby making Halter responsible for the psychological treatment received at Singing River Mental Health, this still does not relieve Claimant from seeking authorization to change treatment to Drs. Hearne and Gupta. If Singing River Mental Health Services was Claimant's choice of physician for treatment of his psychological condition, there is no indication that he was then referred by the physicians there for treatment to Drs. Hearne and/or Gupta and there is nothing to support that Claimant would have been entitled to a change of physician to Drs. Hearne and Gupta. Under the circumstances, even if the past medical treatment with Singing River Hospital Mental Health Services is found to be the liability of Halter, there still remains to question that Halter is not responsible for the treatment by Drs. Hearne and Gupta.

Employer posits that this Court was correct in holding that Claimant did not request authority for the psychological treatment and Claimant is therefore not entitled to past medicals. This Court based its decision on the record including Claimant*s statements and credibility. This Court is in the best position to determine the credibility of the witnesses and the evidence. The Board cannot re-weigh the evidence. Clearly, this Court*s decision should stand as it is supported by substantial evidence, even in light of the points setout by the Board, according to thee Employer.

The Board affirmed this Court*s finding that in the unlikely event Claimant*s past psychological medical treatments are held to be reasonable, Claimant*s travel expenses and medical benefits are to be limited to those reasonable costs that would be incurred in Claimant*s locality. (Decision and Order, p. 10.)

With reference to the issue of medical benefits, the Board held as follows:

"Lastly we consider claimant's contention that the Administrative Law Judge erred in denying Section 7 medical

benefits for the past treatment of Claimant's psychological condition. Under the Act, claimant is entitled to reimbursement for all reasonable and necessary medical treatment related to his work injury. **See Kelley v. Bureau of National Affairs**, 20 BRBS 169 (1988). Specifically, Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." Thus, claimant is entitled to medical benefits regardless of whether his injury is economically disabling so long as the treatment is necessary. **See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]**, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); **Romeike v. Keiser Shipyards**, 22 BRBS 57 (1989). Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. The Board has held that Section 7(d) requires that a claimant request his employer's authorization for medical services performed by any physician, including the claimant's initial choice. **See Ezell v. Direct Labor, Inc.**, 33 BRBS 19, 28 (1999); **Maguire v. Todd Shipyards Corp.**, 25 BRBS 299 (1992); **Shahady v. Atlas Tile & Marble** 13 BRBS 1007 (1981)(Miller, J., dissenting), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146 (1983). Where a claimant's request for authorization is refused by the employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was reasonable and necessary in order to be entitled to such treatment at employer's expense. **See Ezell**, 33 BRBS at 28; **Schoen v. U.S. Chamber of Commerce**, 30 BRBS 112 (1996); **Anderson v. Tod Shipyards Corp.**, 22 BRBS 20 (1989). An employer must consent to a change of physician where claimant has been referred by his treating physician to a specialist skilled in treating claimant's injury. **See Ezell**, 33 BRBS 15 28; **see generally Armfield v. Shell Offshore, Inc.**, 25 BRBS 303 (1992)(Smith, J., dissenting on other grounds); **Senegal v. Strachan Shipping Co.**, 21 BRBS 8 (1988); 20 C.F.R. §702.406(a).

"In the instant case, the administrative law judge determined that employer was not liable for the medical treatment rendered to claimant by Singing River Mental Health Center solely on the basis that claimant failed to request authorization from employer for that treatment. **See** Decision and Order on Remand at 25, 27. However, contrary to the administrative law judge's statement that claimant never sought authorization for this treatment except in legal pleadings filed herein, the record does contain evidence, not considered by the administrative law judge, that claimant did request authorization for his treatment with Singing River. First, the

administrative law judge did not address evidence that claimant was referred to Singing River for mental health treatment by his authorized treating orthopedist, Dr. Longnecker. **See** ALJ EX 12; EX 9; EX 20 at 37-38, 52; TR at 130, 131, 180. Furthermore, the administrative law judge did not consider claimant's hearing testimony that employer was provided with a copy of Dr. Longnecker's referral to Singing River and that claimant called employer to request payment of Singing River's bills and his medications, but that employer denied those requests. **See** TR at 134-135, 180. As the administrative law judge did not consider this evidence which is relevant to claimant's request for medical benefits, we vacate the administrative law judge's denial of payment for treatment provided by Singing River Mental Health Center; on remand, the administrative law judge must address all of the evidence of record regarding claimant's request for authorization and his referral to Singing River by his authorized treating orthopedist. **See Ezell**, 33 BRBS at 28; **Armfield**, 25 BRBS at 309; 20 C.F.R. §702.406(a).

"Next, in denying claimant's request for reimbursement for the services rendered by Drs. Hearne and Gupta, the administrative law judge found, first, that claimant failed to seek prior authorization from employer for treatment with these physicians, and, second, that it was unreasonable for claimant to obtain treatment from these medical providers, who are located at a distance equal to a four-hour drive from claimant's residence when other qualified providers are available in the vicinity of claimant's home. The administrative law judge rule, in the alternative, that if this treatment was held to be reasonable, claimant's travel expenses are denied and medical benefits are limited to those reasonable costs that would be incurred near claimant's home.

"Pursuant to our previous discussion of this issue, the administrative law judge's denial of Section 7 benefits on these grounds is vacated; on remand, the administrative law judge must determine whether employer had previously refused authorization of claimant's mental health treatment, and, if so, whether such refusal released claimant from the obligation of continuing to seek approval for his subsequent mental health treatment. **See Ezell**, 33 BRBS at 28; **Schoen**, 30 BRBS at 113; **Anderson** 22 BRBS at 23. If, on remand, claimant is found to have been released from the obligation to seek employer's approval for his subsequent treatment by Drs. Hearne and Gupta, the administrative law judge must reconsider whether this self-procured treatment was reasonable and necessary. **See Schoen**, 30 BRBS at 113; **Anderson**, 22 BRBS at 23; **see also Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687, 18 BRBS 79(CRT (5th Cir.), **cert. denied**, 479 U.S. 826 (1986); 20 C.F.R. §§ 702.402, 702,413. Moreover, the distance claimant must travel to a chosen physician does not in itself render the treatment

unreasonable; thus, the administrative law judge erred in relying upon this rationale for the denial of all expenses for this treatment. As he found in the alternative, however, claimant's medical expenses may reasonably be limited to those costs which would have been incurred had the treatment been provided locally. **See Schoen**, 30 BRBS at 114-115; **Welch v. Penzoil Co.**, 23 BRBS 395, 401 n.3 (1990); 20 C.F.R. §702.403. In the present case, as the administrative law judge's finding that competent medical care was available to claimant locally is supported by the uncontroverted deposition testimony of Drs. Hearne and Gupta, **see** CX 2 at 19-20; CX 3 at 34, we affirm the administrative law judge's finding that any medical expenses and travel costs awarded for the treatment provided by Drs. Hearne and Gupta are limited to those expenses and travel costs that would have been incurred had the treatment been provided locally."

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish

that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

The leading case on this issue is **Schoen v. United States Chamber of Commerce, et al.**, 30 BRBS 112 (1996) and in **Schoen, supra**, the Benefits Review Board affirmed the holding of my distinguished and retired Administrative Law Judge Donald W. Mosser that the Respondents must pay for that claimant’s self-procured medical treatment costs under Section 7(d) of the Longshore Act because the Respondents constructively refused medical treatment when that claimant had requested treatment by telephone and the respondents did not respond for five (5) weeks. It is well-settled that under Section 7(d) of the Act, an employee is entitled to recover medical benefits if he requests employer’s authorization for treatment, if the employer refuses the request and the treatment thereafter self-procured on the employee’s own initiative is reasonable and necessary. In this regard, **see Anderson v. Todd Shipyards Corp.**, 22 BRBS 20, 23 (1989); **see also Roger’s Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), **cert.**

denied, 479 U.S. 826 (1986); 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406.

While this Employer's mere knowledge of Claimant's pain does not **per se** create an obligation to pay for medical care **in the absence of a request for treatment, Shahady v. Atlas Tile & Marble Co.**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146 (1983), in the case **sub judice**, Claimant testified that his wife called the Employer and asked that his treatment at the Singing River Hospital and his medical bills be paid. As that testimony is uncontradicted in this case, I find and conclude that the Employer refused to authorize and pay for treatment that was reasonable and necessary and that was procured upon referral from Dr. Longnecker, Claimant's treating physician, as prescribed in the doctor's reports in evidence.

In view of the Employer's refusal to authorize those medical benefits, I find and conclude that Claimant's self-procured medical treatment is reasonable and necessary. While the distance a claimant must travel to a chosen physician does not in itself render such treatment unreasonable, the Board did sustain my conclusion that competent medical care was available to Claimant locally and that such conclusion was supported by the uncontroverted deposition testimony of Drs. Hearne and Gupta. **See** CX 2 at 19-20; CX 3 at 34. Thus, any medical expenses and travel costs awarded for the reasonable treatment provided by Drs. Hearne and Gupta are limited to those expenses and travel costs that would have been incurred had the treatment been provided locally. **Welch v. Pennzoil Co.**, 23 BRBS 395, 401 (1990).

In **Schoen, supra**, the Board affirmed the judge's conclusion that that claimant had the burden to establish that the self-procured medical treatment expenses and the amounts thereof were reasonable. **Schoen, supra**, 30 BRBS 113-114. In the case at bar Claimant has had one year to establish the reasonable value of the medical treatment by Drs. Hearne and Gupta, although directed to do so by the Board and by this Administrative Law Judge. (**See** ALJ EX A) However, Claimant has submitted absolutely nothing with reference to the reasonable value of such treatment. While I realize that Claimant is **pro se**[14] at the moment, there is only so much that this Administrative Law Judge can do herein and still retain his impartiality and objectivity and not become a **de facto** advocate for one side or the other.

Accordingly, I am unable to issue an award of medical

[14]By my count Claimant has retained the services and rejected the advice of at least seven (7) attorneys, Claimant apparently seeking a $5,000,000.00 settlement.

benefits for the reasonable and local value of the medical treatment of Dr. Hearne and Dr. Gupta, although the Employer and its Carrier ("Respondents") are responsible for those medical expenses, whatever they are, and an appropriate order will be issued relative thereto. Once Claimant obtains this data, he should submit it to District Director Charles D. Lee and to Attorney Moore for their consideration and, hopefully, the parties will be able to resolve that issue. Moreover, I shall also issue an award of future medical benefits for Claimant's orthopedic and psychological problems. Respondents are also responsible for the $75.00 bill relating to Dr. Longnecker's August 20, 2001 report (CX I) as well as his recent admission to the Charter Hospital.

II. **WHETHER THIS COURT ERRED IN CONCLUDING THAT CLAIMANT'S NEWLY SUBMITTED EVIDENCE IS INSUFFICIENT TO SHOW A CHANGE IN CONDITION OR A MISTAKE OF FACT.**

Section 22 of the Act

Section 22 provides the only means for changing otherwise final compensation orders. Under Section 22, any party-in-interest, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, may request modification because of a mistake in fact or change in condition. Section 22, as amended by the 1984 Amendments, states that "any party-in-interest" includes an Employer or Carrier granted relief under Section 8(f) and that the section applies to cases under which payments are being made by the Special Fund. Also, the 1984 amended version specifically provides that the section does not authorize the modification of settlements. The effective date of the amended Section 22 is specified in Section 28(3)(1) of the Amendments, 98 Stat. at 1655. **See Brady v. J. Young & Co.**, 18 BRBS 167, 170 n.5 (1985) (**Decision on Reconsideration**); **Lambert v. Atlantic & Gulf Stevedores,** 17 BRBS 68 (1985).

The scope of modification is not narrowed because the Employer is seeking to terminate or decrease an award. **McCord v. Cephas**, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976), **rev'g** 1 BRBS 81 (1974). Section 22 was intended by Congress to displace traditional notions of **Res Judicata**, and to allow the fact-finder, within the proper time frame after a final decision or order, to consider newly submitted evidence or to further reflect on the evidence initially submitted. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459, **reh'g denied,** 404 U.S. 1053 (1972); **McCarthy Stevedoring Corp. v. Norton**, 40 F.Supp. 960 (E.D. Pa. 1940).

A request for modification need not be formal in nature. It

simply must be a writing which indicates an intention to seek further compensation. **Banks v. Chicago Grain Trimmers Assoc.,** 390 U.S. 459 (1968); **Fireman's Fund Insurance Co. v. Bergeron,** 493 F.2d 545 (5th Cir. 1974), **reh'g denied**, 391 U.S. 929 (1968); **Hudson, supra**, 16 BRBS 367. However, the Benefits Review Board has held that telephone calls to the Deputy Commissioner's office, made within one year of the last payment of compensation, was sufficient to constitute a request for modification as Claimant indicated during those calls that he believed he had suffered a change in condition and was seeking additional compensation. **Madrid v. Coast Marine Construction Company**, 22 BRBS 148 (1989). A deputy commissioner's written memorandum summarizing his telephone conversation with claimant was sufficient to constitute a request for modification because the memorandum reflected that claimant was dissatisfied with his compensation. **See also McKinney v. O'Leary,** 460 F.2d 371 (9th Cir. 1972). It is irrelevant whether an action is labeled an application or modification or a claim for compensation as long as the action comes within the provisions of **Banks, supra**, 390 U.S. 459.

Similarly, a Claimant is not required specifically to characterize the modification request as being based on either a change in condition or mistake in determination of fact. **Cobb v. Schirmer Stevedoring Co.**, 2 BRBS 132 (1975), **aff'd,** 577 F.2d 750, 8 BRBS 562 (9th Cir. 1978). Moreover, an Administrative Law Judge is not precluded from modifying a previous order on the basis of a mistake in fact although the modification was sought for a change in condition. **Thompson v. Quinton Engineers, Inc.**, 6 BRBS 62 (1977); **Pinizzotto v. Marra Bros., Inc.**, 1 BRBS 241 (1974). **See also O'Keefe v. Aerojet-General Shipyards, Inc.**, 404 U.S. 254, 92 S.Ct. 405 (1972), **reh'g denied**, 404 U.S. 1053, 92 S.Ct. 702 (1972); **McDonald v. Todd Shipyards Corp.**, 21 BRBS 184 (1988).

Modification based on a change in condition is granted where the Claimant's physical condition has improved or deteriorated following entry of the award. The Board has stated that the physical change must have occurred between the time of the award and the time of the request for modification. **Rizzi v. The Four Boro Contracting Corp.**, 1 BRBS 130 (1974).

The party requesting modification due to a change in condition has the burden of showing the change in condition. **See Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168 (1984) (since Claimant's inability to perform his secondary occupation of farming existed at the time of the initial proceeding and the evidence could support the Administrative Law Judge's finding of no increased loss to Claimant's injured hands, Claimant failed to demonstrate a change in condition); **Kendall v. Bethlehem**

Steel Corp., 16 BRBS 3 (1983) (Claimant did not establish that his back condition had worsened since the prior decision denying benefits and thus had no compensation disability as a result of his back injury). Since the party requesting modification has the burden of proving a change in condition, the Section 20(a) presumption is inapplicable to the issue of whether Claimant's condition has changed since the prior award. **Leach v. Thompson's Dairy, Inc.**, 6 BRBS 184 (1977).

As indicated above, the Benefits Review Board, in a reversal of prior Board precedents, held that a change in Claimant's economic condition also may provide justification for Section 22 modification. In **Fleetwood v. Newport News Shipbuilding & Dry Dock Co.**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985), the Board held that Employer should no longer have to compensate Claimant when there has been a change in Claimant's economic condition so that there is no longer a loss in wage-earning capacity. In affirming, the Fourth Circuit rejected the argument that prior cases have held to the contrary. **Finch v. Newport New Shipbuilding and Dry Dock Company,** 22 BRBS 196, 201 (1989); **Vilen v. Agmarine Contracting Inc.**, 12 BRBS 769 1980); **cf. Verderane v. Jacksonville Shipyards, Inc.** 772 F.2d 775, 17 BRBS 154 (CRT) (11th Cir. 1985), **aff'g** 14 BRBS 220.15 (1981); **General Dynamics Corp. v. Director, OWCP**, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982), **aff'g sub nom. Woodberry v. General Dynamics Corp.**, 14 BRBS 431 (1981).

It is also well-settled that a modification order decreasing compensation may not affect any compensation previously paid, although Employer is entitled to credit any excess payments already made against any compensation as yet unpaid. A modification order increasing compensation may be applied retroactively if this Administrative Law Judge determines that according retroactive effect to the modification order renders justice under the Act. **McCord, supra,** 532 F.2d at 1381.

Modification based on a change in condition may be granted where a Claimant*s physical or economic condition has improved or deteriorated following the entry of an award of compensation. **Wynn v. Clevenger Corp.**, 21 BRBS 290 (1988). A mistake of fact is also a basis for a Section 22 modification. It is well-established that the party requesting modification has the burden. **See**, ~ **Metropolitan Stevedore Co. v. Rambo** (Rambo III, 521 U.S. 121, 31 BRBS 54 (CRT) (1997); **Vasquez v. Continental Maritime of San Francisco. Inc.**, 23 BRBS 428 (1990). Section 22 modification is not available for strictly legal error. That is, it is generally not available when an issue could have been raised in the original proceedings but was not. **Stokes v. George**

Hyman Construction Co., 19 BRBS 110 (1986). Thus, Section 22 is not intended as a method for a party 'to correct errors or misjudgments of counsel." **General Dynamics Corp. v. Director, OWCP [Woodberry]**, 673 F.2d 23, 26, 14 BRBS 636, 640 (1st Cir. 1982); **See also Lombardi v. Universal Maritime Service Corp.**, 32 BRBS 83, 86-87 (1998); **i2~liu~ v. Jones Wasin~ton Stevedoring~ Co.**, 31 BRBS 197, 204 (1998). Furthermore, any legal error committed by the judge, such as the exclusion of certain evidence, is not grounds for a Section 22 modification. **Swain v. Todd Shipyards Corp.**, 17BRBS 124 (1985).

Where a party seeks modification based on a change in condition, an initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating that there has been a change in claimant*s condition. **See Duran v. Interport Maintenance Corp.**, 27 BRBS 8 (1993). This initial inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the claim within the scope of Section 22. If so, then the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a change in claimant*s physical or economic conditiori from the time of the initial award to the time modification is sought. Once the petitioner meets its initial burden of demonstrating a basis for modification, the standards for determining the extent of disability are the same as in the initial proceeding. See [Rambo II], 521 U.S. 121, 31 BRBS 54(CRT); **Delay**, 31 BRBS at 204; **Vasquez**, 23 BRBS at 431.

In **Kinlaw v. Stevens Shipping and Terminal Company**, 33 BRBS 68, 73 (1999), the Benefits Review Board affirmed that the administrative law judge finding that the employer was attempting to obtain modification based on evidence which it should have developed previously, thus employer failed to meet its initial burden of establishing that the supplemental evidence to be produced with the request for modification would bring the case within the scope of Section 22. In holding such, the Board stated that Section 22 should not be allowed to become a back door for correcting tactical errors or omissions. Id. at 73. **See McCord v. Cephas**, 532 F.2d 1377, 1381, 3 BRBS 371, 377 (D.C. Cir. 1976); **Stokes v. George Hyman Const. Co.**, 19 BRBS 110, 113 (1986).

Furthermore, in **Lombardi**, the employer attempted to obtain a Modification and submitted a Doctor*s report in support thereof. The Board affirmed the administrative law judge*s determination that the new medical report of the doctor failed to demonstrate a change in claimant*s physical condition. In

denying the employer*s request for a Section 22 modification the Board stated that the administrative law judge rationally concluded that the newly submitted medical report did not reflect any change in claimant*s medical condition between the time of the award and the time of the modification request that would support modification. **Lombardi**, 32 BRBS at 86-87; **See generally Kendall v. Bethlehem Steel Corp.**, 16 BRBS 3 (1983).

Employer submits that this Court*s **Decision and Order Denying Motion for Modification** correctly applied the standard for modification and found Claimant did not show either a mistake in determination of fact nor did Claimant show a change in condition, either economic or medical. Although Claimant alleges many legal errors committed by this Judge, Claimant does not provide any case law or code section to support these unsubstantiated allegations. As cited above, even if the this judge committed legal error, such is not the grounds for the Section 22 modification sought by Claimant. Consequently, this Court was well within its discretion and correctly denied Claimant*s Motion for Modification, according to the Employer.

Employer further submits that the medical evidence submitted by the Claimant in support of his modification request does not show a change in condition or a mistake of fact. The entire record in this matter, which is extensive after several extensions of the deadline, was closed on January 8, 1997. Claimant cannot and should not be permitted to submit additional documents as if the record is still open on this matter. The documents do not meet the Section 22 requirement, according to the Employer.

Employer posits that even if the documents had not previously been entered into the record, that fact alone is insufficient to warrant their admission and review at this time. The supplemented documents need to show a mistake of fact or a change in Claimant’s condition. Claimant’s additional medical records do not alter the record as it stands. The additional records are merely doctor’s notes from additional visits without any additional diagnoses. Thus, even if this Court finds these records do show a change in condition or a mistake of fact, they do not overcome the opinion of Dr. Maggio as to Claimant’s ability to perform the alternate employment, according to the Employer’s thesis.

While I agree with the Employer’s position, the Board obviously disagrees with the Employer and I am constrained to follow the Board’s directions herein. Only in this way will the Employer be able to present this case to the U.S. Court of Appeals for the Fifth Circuit for their review of the Board’s actions herein, in light of **Conoco, Inc.** (**See** footnote 1)

Again to put this issue into proper perspective, I shall quote the Board's instructions on pages 7 and 8 of its January 10, 2001 decision.

"We next address claimant's assignment of error to the administrative law judge's denial of his request for modification. Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. **See Metropolitan Stevedore Co. v. Rambo [Rambo I]**, 515 U.S. 291, 30 BRBS 1 (CRT)(1995). It is well-established that the party requesting modification bears the burden of proof. **See, e.g, Metropolitan Stevedore Co. v. Rambo [Rambo II]**, 521 U.S. 121, 31 BRBS 54 (CRT)(1997); **Kinlaw v. Stevens Shipping & Terminal Co.** 33 BRBS 68 (1999), **aff'd mem.**, No. 99-1954 (4th Cir. Dec. 8, 2000). To reopen the record under Section 22, the moving party must allege a mistake of fact or change in condition and assert that the evidence to be produced or of record would bring the case within the scope of Section 22. **See Kinlaw**, 33 BRBS at 73; **Duran v. Interport Maintenance Co.**, 27 BRBS 8 (1993).

"Where a party seeks modification based on a change in condition, an initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating that there has been a change in claimant's condition. **See Jensen v. Weeks Marine, Inc.**, 34 BRBS 147 (2000); **Duran**, 27 BRBS at 14. Where modification based on a mistake of fact is sought, the decision as to whether to reopen a case under Section 22 is discretionary, and is contingent upon the fact-finder's balancing the need to render justice against the need for finality in decision making. **See Kinlaw**, 33 BRBS at 72-73; **see also General Dynamics Corp. v. Director, OWCP [Woodberry]**, 673 F.2d 23, 14 BRBS 636 (1st Cir. 9182); **McCord v. Cephas**, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); **Lombardi v. Universal Maritime Service Corp.**, 32 BRBS 83 (1998).

"In the present case, the administrative law judge concluded that claimant's newly submitted evidence is insufficient to show a change in condition or a mistake of fact. Specifically, the administrative law judge found that the medical records have already been made a part of the record and that the remaining evidence submitted is irrelevant to this proceeding. Contrary to the administrative law judge's finding, however, claimant, in requesting modification, submitted medical records which were not previously made part of the record; specifically, claimant introduced medical records from the Singing River Mental Health Center dating from 1997 to 1999 and Dr. Hearne's report dated

October 21, 1999. Because these records were erroneously found by the administrative law judge to have previously been admitted into evidence, we must vacate the administrative law judge's denial of modification. If, on remand, the administrative law judge again denies disability benefits on the basis of the existing record, he must reconsider whether the newly submitted medical evidence supports reopening the record pursuant to Section 22. **See generally Kinlaw**, 33 BRBS at 68; **Wynn v. Clevenger Corp.**, 21 BRBS 290 (1988)."

Once the party moving for modification meets his initial burden of demonstrating a basis for modification, the standards for determining the extent of disability are the same as in the initial proceeding. **See Rambo II**, 521 U.S. at 121, 31 BRBS at 54 (CRT)(1997); **Jensen**, 34 BRBS at 149; **Delay v. Jones Washington Stevedoring Co.**, 31 BRBS 197, 204 (1998).

Although the newly-submitted medical records, as extensively summarized above, do not explicitly address the effect of Claimant's psychological condition on his employability, they do discuss Claimant's continuing psychological problems.

Initially, I note that the Board has affirmed my finding that the non-medical evidence submitted by Claimant, **including the numerous biblical references to the "wicked judges" of the Old Testament**, is irrelevant and immaterial to this proceeding and does not support reopening the record. Accordingly, that non-medical evidence shall play no part in this decision.

This Administrative Law Judge, having reconsidered the newly-submitted medical evidence in light of the Board's directions to me, now finds and concludes that such evidence does support reopening this record to reconsider the issue of disability. Accordingly, Claimant's **Motion for Modification** is **GRANTED** as that evidence does establish a change in Claimant's physical condition.

As the Board notes, Claimant has introduced medical records from the Singing River Mental Health Center dating from 1997 to 1999 and Dr. Hearne's report dated October 21, 1999. These reports and progress notes were a part of the official record but I did not accept such evidence because in my prior decisions I had given more weight to the opinions of Dr. Maggio and little or not weight to the Claimant's medical evidence in the form of the reports and testimony of Dr. Hearne and Dr. Gupta. As the Board has disagreed with my previous weighing of that evidence and as I have now reversed my conclusions, under constraint, and as I am now giving more weight to the opinions of Claimant's treating physicians, I now find and conclude that the medical records from the Singing River Mental Health Center and, most particularly, the October 21, 1999 report of Dr. Hearne do

support reopening the record to reconsider the issue of disability in light of the fact that it is the Employer's burden to establish that the Claimant is able to perform the job within the Employer's facility from a psychological standpoint. **See Turner**, 661 F.2d at 1040-1041, 14 BRBS at 163. As noted above, the Employer has not sustained its burden.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents initially accepted the claim, provided certain medical care and treatment and voluntarily paid certain compensation benefits to the Claimant and timely controverted his entitlement to further benefits. **Ramos v. Universal**

Dredging Corporation, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Attorney's Fee

Claimant's prior attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer and it Carrier ("Respondents" herein). Claimant's attorney filed a fee application on June 30, 2001 (CX F2), concerning services rendered and costs incurred in representing Claimant between April 19, 2001 and June 27, 2001. Attorney Robert E. O'Dell seeks a fee of $1,264.82 (including expenses) based on 6.60 hours of attorney time at $175.00 per hour.

In light of the nature and extent of the legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Respondents' lack of comments on the requested fee, I find a legal fee of $1,264.82 (including expenses of $109.82) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses.

Claimant's Section 49(a) (now 48A) alleged discrimination claim is **DENIED** (1) as Claimant submitted no evidence relating to that claim, (2) as that issue was not appealed to the Board and (3) was not included in the Board's directions to the Administrative Law Judge.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer and Carrier ("Respondents") shall pay to the Claimant compensation for his temporary total disability from April 14, 1994 through the present and continuing, based upon an average week wage of $388.29, such compensation to be computed in accordance with Section 8(b) of the Act.

2. The Respondents shall receive credit for all amounts of compensation previously paid to the Claimant as a result of

his March 3, 1994 and April 13, 1994 injuries before me.

3. Interest shall be paid by the Respondents on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries referenced herein may require. The medical expenses awarded herein relate to Claimant's orthopedic and psychological problems and Respondents shall also authorize and pay for Claimant's psychological counseling in the Gulfport - Biloxi, Pascagoula and Moss Point, Mississippi areas. If Claimant does go to Jackson, Mississippi for such counseling, the doctors' reimbursement shall be limited to the reasonable value of such services within the geographical area delineated in this **ORDER** provision. The Respondents shall also pay the reasonable value of the past bills of Dr. Hearne and Dr. Gupta once those past bills are presented to the District Director for his consideration, review and recommendation. Respondents shall also pay the $75.00 medical bill (CX I) from Dr. Longnecker for his August 20, 2001 report (CX J), as well as any other unpaid bills of the doctor for the injuries before me, subject to the provisions of Section 7 of the Act.

5. The Employer shall pay to Claimant's prior attorney, Robert E. O'Dell, the sum of $1,264.82 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between April 19, 2001 and June 27, 2001.

A
DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:jl